Viacom International, Inc. et al v. Youtube, Inc. et al
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Exhibit 1

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DAVID SHAW NICHOLLS,

Plaintiff,

v. 04 CV 2110 (WHP)

TUFENKIAN IMPORT/EXPORT
VENTURES, INC., d/b/a
TUFENKIAN CARPETS,
and JAMES TUFENKIAN,

Defendants.

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September 13, 2004
10:00 a.m.

Before:

HON. WILLIAM H. PAULEY III

District Judge

APPEARANCES

WHITE & CASE LLP
Attorneys for Plaintiff
BY: JONATHAN E. MOSKIN

COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Defendant
BY: ROBERT WILLIAM CLARIDA
JASON DAVID SANDERS

(In open court; jury panel not present)

THE COURT: Good morning.

THE CLERK: David Shaw Nicholls v. Tufenkian Import/Export Ventures, Inc., et al. Will the plaintiff give their appearance.

MR. MOSKIN: Jonathan Moskin of the firm White & Case for the plaintiff, David Shaw Nicholls.

THE CLERK: Will the defense counsel give their appearance.

MR. CLARIDA: Robert Clarida of Cowan Liebowitz & Latman. With me at defense counsel table is Jay Sanders of Cowan Liebowitz & Latman, and the defendant. We represent the defendant James Tufenkian and Tufenkian Import/Export Ventures.

THE COURT: All right. Good morning. Mr. Moskin, who is joining you at counsel table?

MR. MOSKIN: This is David Shaw Nicholls. And apparently they were held up in traffic; a paralegal will be arriving momentarily with some boxes. His name is Jason Shaw.

THE COURT: All right.

MR. MOSKIN: He is in the building.

THE COURT: If he will be sitting at counsel table, I will introduce him as well during voir dire.

So I will be introducing counsel and the parties to the jury, and when I introduce you, after I've introduced the team for each side, I would like you to stand up and face the

jurors and turn around and face the prospective jurors who will be in the rear of the courtroom, just so we can make sure that nobody recognizes you or knows you.

This case is on for trial. Are the parties ready to proceed?

MR. MOSKIN: The plaintiff is ready, your Honor.

MR. CLARIDA: Defendants are ready to proceed, your Honor.

THE COURT: I said on Friday at the final pretrial conference that I was going to consider further the arguments that were advanced by the plaintiff in connection with the plaintiff's motion to amend the complaint to assert a punitive damages claim against the defendants, and I am prepared to rule on that matter at this time.

The plaintiff, David Shaw Nicholls, moves for leave to amend his complaint in this copyright action to allege a claim for punitive damages. Defendants, Tufenkian Import/Export Ventures, Inc., and James Tufenkian, collectively defendants, oppose plaintiff's request, arguing that as a matter of law, punitive damages are not available for copyright infringement actions.

Plaintiff alleges that defendants infringed his registered copyright design, in violation of federal copyright law. The Copyright Act provides his sole remedy. See 17 U.S.C. Section 504. See also Sony Corporation of America v.

Universal City Studios, Inc., 464 U.S. 417, 431 (1984). There, the Supreme Court held, "The remedies for infringement are only those prescribed by Congress," quoting from Thompson v. Hubbard, 131 U.S. 123, 151 (1889) -- an oldy but a goody.

The Copyright Act provides for (1) recovery of the copyright owner's actual damages and any additional profits of the infringer, or (2) statutory damages. 17 U.S.C. Section 504. The Copyright Act contains no provision for punitive damages. A.G. v. Paramount Communications, Inc., 114 F.3d 395, 396-97 (2d Cir. 1997) ("Punitive damages are not available under the Copyright Act.") And Eboler v. Golden, 714 F.2d 211, 213 (2d Cir. 1983) ("Punitive damages are not available in statutory copyright infringement actions.")

Indeed, recently, the Second Circuit noted, I quote, "As a general rule, punitive damages are not awarded in a statutory copyright infringement action. The purpose of punitive damages, to punish and prevent malicious conduct, is generally achieved under the Copyright Act through the provisions of 17 U.S.C. Section 504(c)(2), which allow increases to an award of statutory damages in cases of willful infringement. That is On Davis v. The Gap, Inc., 246 F.3d 152, 172 (2d Cir. 2001).

While the Court's language leaves open the possibility of punitive damages in cases where the "general rule" may not apply, this Court's survey of cases indicates that only the

general rule applies to this action. Further, as my colleague, Judge Lynch, has noted, the Second Circuit's suggestion that punitive damages might be available in some circumstances is dicta because in On Davis, the plaintiff failed to show willful infringement, and so the issue of punitive damages was purely hypothetical. See, e.g., Leutwyler v. Royal Hashemite Court of Jordan, 184 F.Supp.2d 303, 308 (S.D.N.Y. 2001).

Even though punitive damages have been awarded in some common law copyright infringement actions as a matter of state law, such a common law claim has been preempted by the Copyright Act of 1976. Eboler, 714 F.2d at 213, citing 17 U.S.C. Section 301.

Plaintiff cites to a recent decision by District Judge Stanton, Blanch v. Koons, 03 Civ. 8026 (S.D.N.Y. 2004), to argue that courts in the Southern District are beginning to recognize that punitive damages may be awarded in copyright actions. However, for the reasons that I have noted above, I believe that Blanch is contrary to existing precedent, and therefore I decline to adopt it.

For the foregoing reasons, plaintiff's motion is denied.

Now, are there any issues that counsel want to take up at this time?

MR. MOSKIN: Not that I'm aware of, your Honor.

MR. CLARIDA: Your Honor, there was also a motion regarding the third-party materials that defendants had proposed to introduce, and plaintiff had moved in limine to preclude those.

THE COURT: Yes. And I think that that is going to have to await the plaintiff's efforts to establish their relevance as this trial unfolds. So you can lodge your objection at the time that they are offered and we will take it up at that time, likely out of the presence of the jury.

In terms of your schedules, currently, it is my plan that when we conclude today at 5 o'clock, we can take a few minutes with counsel and have a charging conference so that both attorneys are clear as to precisely what charge the Court will deliver to the jury in preparing your summations. And that is in the event that we conclude the taking of evidence early enough tomorrow to allow for both sides to complete their summations.

I will not have summations tomorrow if they cannot be completed together. All right. And just by way of planning so that you can think about this, I adhere to the custom, which is that the plaintiff will go first in summation, the defendant will follow up, and then the plaintiff will have a short rebuttal.

Now, the other day I asked you to think about how long your openings are going to be and how much time you would like. Mr. Moskin?

MR. MOSKIN: Yes. I would anticipate no more than 15 or 20 minutes for an opening.

THE COURT: Mr. Clarida?

MR. CLARIDA: Your Honor, I anticipate about 25 minutes for an opening.

THE COURT: All right. I will limit each of you to no more than 25 minutes. And so when you've got just a couple of minutes left, I will let you know and ask you to begin to conclude your opening statement. But I will do that at about the three-minute mark, when you have about three minutes left.

Are there any other issues that counsel want to raise? Yes.

MR. MOSKIN: I will just note one quick point. I handed up to your clerk this morning and gave to Mr. Clarida a brief on the issue, which I think is the only substantive issue that will need to be addressed, or at least the main substantive issue.

THE COURT: Right. Now that punitive damages is off the table, I think the originality question is the only substantive question where the parties are at odds as to what the charge should be, correct?

MR. MOSKIN: I think that's right.

THE COURT: All right. And I'll get a chance to take a look at that either now or during lunch. We can take it up at 5 o'clock.

There are three juries being selected this morning. Only one of them is a criminal case. Criminal cases go first. This is a small venire that we need. We should have some jurors up here in about ten minutes or so.

So, having said that, unless you have any other question you want to raise at this juncture, why don't you take a break and be back in the courtroom about 10:25. We should be ready to go at that point.

MR. MOSKIN: Let me just clarify; you had instructed us, I believe, on Friday to place the exhibit books under the jurors' chairs before they arrive, I believe?

THE COURT: No.

MR. MOSKIN: After they have been impaneled.

THE COURT: After we impanel them, then you will get that opportunity. Otherwise people -- you know, we'll have personal injury actions starting because people are tripping over things in the jury box.

MR. MOSKIN: I was thinking somewhat the same thing.

THE COURT: OK. We want to just -- this is a copyright case. That's it. We don't want it to spin off into anything else.

I'll see you all at 10:25. And why don't we, for the moment, take these charts and just stack them together against the wall. You could put them out before your opening. But this is only a two-day trial. We don't want to scare anybody.

So I am going to suggest that we do that.

And off the record.

(Discussion held off the record)

THE COURT: 10:30, all right. So you have a chance for a cup of coffee. I will see you at 10:30.

(Jury selection)

THE COURT: I think we are ready to go on the record at this time.

Is this jury of eight persons acceptable to the plaintiff, David Shaw Nicholls?

MR. MOSKIN: Yes, your Honor.

THE COURT: And is this jury of eight persons acceptable to the defendants, Tufenkian Import/Export Ventures, Inc., and James Tufenkian?

MR. CLARIDA: It is, your Honor.

THE COURT: Very well. All right. Please administer the oath to the jury.

(A jury of eight was sworn)

THE COURT: Good afternoon, members of the jury. This case is now officially on trial. And now that you've been sworn as jurors in this case, I want to briefly tell you something about your duties as jurors and give you some instructions. And when I'm done giving you some preliminary instructions, which will take about 15 minutes, we're going to violate my own rule about recessing for lunch at 1 o'clock. We

are going to recess for lunch early, and we are going to start earlier this afternoon so that you will hear the opening statements of the attorneys after lunch, as opposed to on an empty stomach. And we will proceed right to a witness after opening statements have been delivered. By the time you leave this courthouse this afternoon at 5 o'clock, you will be deep into this case. So for now, let me give you a few instructions about what you can expect. At the end of the trial, I will give you much more detailed instructions, and those instructions will control your deliberations in this case.

Now, at the end of the presentation of the evidence and my final charge to you on the law, it will be your duty to decide from the evidence what the facts are and then apply those facts to the law. In doing so, you must follow the law as I give it to you. Remember, you are the sole judges of the facts. You must not take anything I may say or do during the course of trial as indicating what your verdict should be. Don't be influenced by my taking notes. What I write down may have nothing to do with the trial or with what you will be concerned with at the trial.

You will decide what the facts are from the evidence that will be presented here in this courtroom. The evidence will consist of the testimony of the witnesses, documents, and other things that are received into evidence as exhibits, and any facts on which the lawyers agree to stipulate.

There are two kinds of evidence: direct and circumstantial evidence. Direct evidence is testimony by a witness about what that witness saw or heard or did. Circumstantial evidence is indirect evidence. That is, it's proof of one or more facts from which you can find another fact. You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both or to none. It's up to you to decide how much weight if any to give to any evidence in this case.

At times during the trial I may sustain objections to questions that are asked. When that happens, I will not permit the witness to answer, or if the witness has already answered, I will strike the witness's testimony from the record and direct you to dismiss it from your minds.

In reaching your decision, you may not draw any inference from an unanswered question, nor may you consider in your deliberations testimony that I have ordered stricken from the record. The law requires that your decision be made solely upon the evidence before you.

The items that I exclude from evidence and from your consideration are excluded because they are not legally admissible as evidence. The law does not, however, require you to accept all of the evidence that I do admit. In determining what evidence you will accept, you must make your only valuation of the testimony given by each of the witnesses and

of the documents presented to you and determine the weight if any you choose to give to each witness's testimony or to an exhibit.

There is no magical formula by which you should evaluate testimony or exhibits. At this time, suffice it to say that you bring with you to this courtroom all of the experience and background of your lives. Do not leave your common sense outside the courtroom. Use it in your deliberations. The same types of tests that you use in your everyday dealings are the tests that you can apply in your deliberations.

Now, remember what's not evidence. The questions and objections of the attorneys are not evidence, and neither is the testimony I instruct you to disregard. The statements and arguments of the attorneys during any part of the trial are also not evidence. Further, anything you may see or hear when court is not in session, even if what you see or hear is said or done by one of the parties or by one of the witnesses, it is not evidence. Only what is admitted into evidence here when court is in session and all of the parties and the jurors are present is competent evidence.

I also want to caution you about certain principles governing your conduct as jurors in this case. First, do not talk to each other about this case or about anyone who has anything to do with it until the end of the case, when you go

to the jury room to decide upon your verdict. Second, do not talk with anyone else about this case or with anyone who has anything to do with it, until after the trial has ended and you have been discharged as jurors by me. Anyone else includes members of your family and friends. You may tell them that you are a juror in a civil case, but please do not tell them anything about it until you have been discharged by me. Third, do not let anyone talk to you about the case or about anyone who has anything to do with it. If someone should try to talk to you, please report it to me immediately through my deputy, Mr. Pugliese. And don't tell any other juror about it. Fourth, don't read any news stories or articles or look on the Internet about this case. Don't do any research or any investigation on your own. Anything that you need to know in this case will be presented here in open court by the very capable counsel who represent the parties.

I want to give you a word about trial procedure. In this case, first the plaintiff will make an opening statement, which is simply an outline to help you understand the evidence as it is presented. Then the defendants' attorneys will make an opening statement. Opening statements are neither evidence nor arguments. After the opening statements are completed, the plaintiff will then present his witnesses, and counsel for the defendants may cross-examine them. Following the plaintiff's case, the defendants will present a case. The plaintiffs will

have the opportunity to cross-examine any witnesses testifying for the defendants. After all the evidence is in in this case, the attorneys will present their closing arguments to summarize and interpret the evidence. Following these closing arguments, which are not evidence, I will instruct you on the law. After that, you will retire to deliberate on your verdict, which will be based on the evidence put before you.

Now, I permit jurors to take notes if they want during the course of a trial, and notepads and pens will be provided to you at the expense of the courts. But you don't have to take notes. Notes are just an aid to your own recollections. The court reporter in this case is outstanding and takes down everything that is said here in court and will read it back to you during your deliberations, any portion of the testimony that you may ask for.

So please be careful if you do take notes, because it presents the further problem that in taking notes, you may be distracted from something important that's happening right up here on the witness stand. That's what a trial is all about.

For those of you who don't take notes, don't be influenced by those who do. Rely on your own recollections. And don't be influenced by the fact that another juror has taken notes. Notes are not evidence, and are by no means a complete outline of the proceedings or even a list of the highlights of the trial.

Now, as I've said earlier, this is a relatively small, at least it seems like that to me, courthouse. And you may see the parties, or counsel. If you do, please don't have any contact with them. And if you happen to step into an elevator and they're in the elevator and they step out, it's not because they're being rude. It's because they want to avoid any contact with you.

To that end, to the extent that any of you wish to have lunch in a government cafeteria, you are not to have your lunch in this building. You are not to go on the eighth floor of this building, because counsel and the parties will be using the eighth-floor cafeteria here. There is a cafeteria across the street in the other courthouse at 40 Foley Square, directly across the street, on the fifth floor. You can go there if you have an abiding desire to have food from a government cafeteria. They are both fine cafeterias.

Now, my deputy is going to get some contact information from you for a few minutes in the jury room. We are going to resume with the trial of this case at 1:45 this afternoon, so I know it breaks the rule that I said we take lunch from 1 to 2:15, but there is simply no point in not taking lunch now so we can move through the trial in an efficient way.

It's a magnificent day outside. Walk around. Just don't talk about the case or think about it. And be back here

in the jury room ready to go at 1:45, because we can't start without you, and we want to all start at 1:45. The lawyers and the parties are all raring to go. And it's a short but fascinating little trial that you are about to embark on that is of great importance to the parties and the Court.

Have a great lunch. Please recess the jury.

(The jury left the courtroom)

THE COURT: Are there any issues that counsel want to raise at this juncture?

MR. MOSKIN: Plaintiff has none.

MR. CLARIDA: No, your Honor.

THE COURT: All right. I will see you all at 1:45. Be ready to go at that time. We will be moving the podium into the middle of the jury box, in front of it, and you are free to move about the courtroom.

Let me just say that a couple of pet peeves of mine are, when the oath is administered to a witness, all counsel should be seated. Then I will acknowledge you and you can go to the podium. If you have an objection, please stand and say that you have an objection. And don't make speaking objections. If you want to give me a shorthand, you can give it to me. If I'm not understanding what the objection is, I will bring you up to the sidebar. Please try to keep sidebars to an absolute minimum by raising issues with me before the jury comes in.

I like lawyers when they're questioning a witness to stand behind the podium and speak into the microphone so that everyone can hear them. You are free to approach a witness with a document at any time, to show the witness, without asking permission of the Court. But when you're questioning a witness, you should be questioning the witness from the podium.

All right. I will see you at 1:45. Have a good lunch.

(Luncheon recess)

(Continued on next page)

A F T E R N O O N   S E S S I O N

1:50 p.m.

(Jury not present)

THE COURT: We are waiting for one juror, Juror No. 7, Ms. Deweese, who of course lives the closest to the courthouse.

She is now here.

Mr. Clarida, will you be giving the opening for the defendant?

MR. CLARIDA: Yes, I will, your Honor.

THE COURT: Fine. Just a reminder: 25 minutes is the cutoff. Take the time to make it shorter. With about three minutes left in your time, I will let you know that you should begin to wrap it up.

(Jury present)

THE COURT: Good afternoon, members of the jury.

JURORS: Good afternoon.

THE COURT: That sounds rather weak. You should be thoroughly fortified by now. And almost all of you were here at the designated time. Please make the effort to be here when we say we're going to start, because as a result we have lost five minutes. There are a lot of people involved in this case. There is no reason for anyone not to be here at the appointed hour.

Now we are going to proceed to the first phase in any trial. That is opening statements. Remember what I told you. Opening statements are not evidence or argument. They are just an outline of what the lawyers think is going to be proved during the course of this trial. It's just an introduction. And members of the jury, with that in mind, I ask that at this time you give your undivided attention to Jonathan E. Moskin, Esq., as he delivers his opening statement on behalf of the plaintiff, David Shaw Nicholls.

MR. MOSKIN: Thank you, your Honor.

And thank you, ladies and gentlemen of the jury. We appreciate that you all have other important things to do. This case is of course very important to my client. And we do appreciate being able to indulge your time to get your reasoned opinion as to the proper outcome of the case.

This is a case at least, if I can't promise you high drama of, you know, television courtroom scenes -- no one will

die in the end, no one's going to jail, there won't be, I don't expect, any emotional breakdowns on the witness stand -- at least it can offer you something that is very intuitively appealing and easily accessible subject matter, and I think kind of fun, in that it's a copyright case involving some interesting rug designs. And what you will be doing is looking at those rug designs and giving us your opinion about those designs and whether they are too similar.

There are three designs in issue. I put up on a board a blow-up or picture of my client's design, or one of the color ways in which the design is done. It is entitled the Prado, and it was created by David Shaw Nicholls in approximately 1997 or 1998 over a period of time.

We have also -- some of these rugs are very large, and we would probably cover the entire courtroom. We have brought in sections of the rugs so you can see what they actually look like. So this, for example, is one.

THE COURT: And members of the jury, you can stand up if you want to see this rug that Mr. Moskin is displaying.

MR. MOSKIN: And as you can imagine, proportionately, extending this to the full side of this would be a very large rug. Here, too, is another sample, just a part of the rug so you can get some sense, a good sense, of what it actually looks like.

Now, dates are going to be very important in this

case. First, let's start with a little history. My client, David Shaw Nicholls, you will learn, has been a designer for 20 years. As I mentioned, he created this Prado design in 1997 or 1998. So I'm going to make a few notes for you on the board.

Now, at the time he created this design, Mr. Nicholls and Mr. Tufenkian were engaged together in a business venture. Mr. Tufenkian, who has a very large manufacturing operation, was making rugs for Mr. Nicholls. That relationship began in 1996. So we start in 1996.

That relationship continued until April of 2000, when, as unfortunately often happens, the relationship ended up in a litigation. We don't intend to retry that case here. In many ways it doesn't really matter what happened. If either party wishes to raise some of the facts, maybe they will. But what most matters is, the business relationship ended in the year 2000, in April 2000.

Now, the Prado rug already existed, all though Mr. Tufenkian's company never manufactured any of the Prado rugs for Mr. Nicholls. The timing here gets very interesting because, in May of 2000, the New York Times, in the Sunday magazine, had an article about a very well-known, two very well-known names, Philip Johnson and Blanchette Rockefeller. The Rockefeller name you all know. Philip Johnson designed a townhouse for Mr. Rockefeller and used some of Mr. Nicholls' rugs, the Prado rugs, in that townhouse. That was featured in

The New York Times in May of 2000. So fairly prominent publicity.

The following month, in June, some more publicity. Mr. Nicholls distributed approximately 3,000 postcards showing the Prado rug. And although he didn't know it at the time, just a month or two later, although Mr. Nicholls didn't know it at the time, just a month or two later, Mr. Tufenkian created the accused design, in July or August, the Eclipse.

Now, as I say, Mr. Nicholls did not know about this until somewhat later. In fact, it was not until December of 2003 that Mr. Nicholls, reading a magazine, I believe it was entitled Elle Decor, to which he subscribes, saw the following, which is Mr. Tufenkian's Total Eclipse, a modification of the earlier Eclipse. And we're not contending in this case that these are exact copies. Obviously anyone can look at those and see they are somewhat different. And the Judge will instruct you at the end of the case as to what is the proper law and how you are supposed to evaluate these and how much similarity is too great. Nor are we contending that Mr. Nicholls invented the circle. However, what you will see in this case is that -- and I guarantee you this -- is that there are no other designs that will be shown that look remotely like either of these two. The timing and the similarities are just too suspicious to be explained in any other way than that this was copied. Again, we don't intend to show, nor do we have to show, that it was an

exact copy, just that he copied too much. And, again, the Judge will explain what that means later.

You also will not hear any evidence or a direct admission by Mr. Tufenkian that, yes, I copied this. In fact, they are going to take, I understand, the very opposite position, that the similarities are mere happenstance. But as the Judge explained, there are different kinds of evidence. He explained already to you, there are different kinds of evidence. There is direct evidence and circumstantial evidence. And we believe the circumstances are such, the timing and the similarities, as well as the absence of anything else that looks remotely like these designs, that under the circumstances, point to only one conclusion.

A word about what will happen. There is a question that has been raised in this case whether this date, the 1997 to 1998 date, is accurate, whether in fact the Prado was created then. So we will at the beginning. After Mr. Nicholls has a chance to be introduced to you so you know a little bit about his history as a designer, we will show you some evidence or intend to show you evidence about the history and confirming the timing of the creation of the design.

We will also show you fairly extensive records concerning the creation of the Prado, how it evolved, specific drawings that Mr. Nicholls created and sketches he made, and you will see, I expect, that the work didn't simply begin as a

finished product of a grid of circles of a specific size in the proportional spacing you see there. They began in a very different type of spacing. And the process, the original creation process, was an evolutionary one until he arrived at this image.

In the end, we will also then show you, before the end, we will show you the development of the, not only the Total Eclipse design, the one accused design, but the original one that was created in June of 2000.

This is a computer rendering, which we hope, which we expect to offer into evidence, which is the skeleton, as it were, for the Total Eclipse design -- excuse me -- for the original Eclipse design. I apologize. And what we contend and hope to show is that all Mr. Tufenkian did was, he took my client's Prado design and added a few vertical elements to the otherwise predominantly horizontal array of circles with a specific proportionate spacing and a specific size, with framing elements -- not a full frame, for those of you who are traditional -- accustomed to buying oriental rugs, but modest framing elements that pick up the same sort of theme that was used in the Prado.

Again, I can be very brief, and I'm going to wrap up in a moment. What we are not claiming, we are not claiming that Mr. Nicholls invented the circle. But you will find, I think, conspicuous more by its absence than by anything else,

that there simply are not circles in anything resembling this sort of an array, and certainly not with this sort of bisection with parts cut off and in contrasting colors, in the carpet world or, really, any other part of the design world.

What is original about the design and what I believe you will ultimately, I hope you will ultimately conclude is something that's shared by all three of the designs is a similar array of circles in a certain proportionate spacing, with these virtually identical bisections or cutting off of parts of the circle in a predominantly horizontal way, with contrasting colors to accentuate that difference. And again it's something that just, it hasn't been done in the design world.

We will, in conclusion, offer evidence of Mr. Tufenkian's sales and ask that you consider an award of the profits that Mr. Tufenkian earned from those sales, of the Eclipse and the total Eclipse.

And that is all I have for my opening statement. Thank you.

THE COURT: Members of the jury, at this time I would ask that you give your undivided attention to Robert W. Clarida, as he delivers his opening statement on behalf of the defendants, Tufenkian Import/Export Ventures, Inc., doing business as Tufenkian Carpets, and James Tufenkian.

MR. CLARIDA: Good afternoon, ladies and gentlemen of

the jury. I'm Robert Clarida, and I represent the defendants in this case -- and that's James Tufenkian; he is seated at counsel table in the back -- and his company, Tufenkian Import/Export Ventures, Inc. You have an opportunity and an obligation here today to resolve the dispute between James Tufenkian and the plaintiff in this case, Mr. Shaw Nicholls. The dispute, in a nutshell, as Mr. Moskin just told you, is whether either of the Tufenkian rugs, which are the Eclipse and the Total Eclipse, in the center and the right as you're looking at them, whether either of those two rugs is so similar to the Prado design by David Shaw Nicholls, on the left as you're looking at it there, that James Tufenkian shouldn't be allowed to sell his rugs under the copyright law of the United States.

Mr. Moskin didn't show you an actual photograph of the

Total Eclipse rug. He showed you a line drawing, a skeleton line drawing. What we're talking about in this case are rugs, and that is a photograph of the Eclipse rug that was designed in 2000, at the time that all of this activity was going on that Mr. Moskin alluded to.

Now, Mr. Moskin also didn't indicate that these rugs come in various color ways. They all come in different combinations of colors. They are referred to as color ways. So you can't really limit yourself to thinking about rugs in a particular color, because these rugs could come in any variety

of colors, and the colors may or may not be significant in a given case.

But to answer the question about similarity, whether the rugs at issue here are similar enough, all you really need is your own good eyes and your own common sense and the evidence that we're going to present to you in this case. You will hear testimony from Mr. Shawn Nicholls and from James Tufenkian about the way these rugs were created, when they were created, where they were created, based on what they were created. The evidence will prove to you first that James Tufenkian never saw Mr. Shaw Nicholls' design until shortly before he got hit with this lawsuit, and certainly not before he designed either the Eclipse or the Total Eclipse. So he couldn't possibly have copied Mr. Shaw Nicholls' design. The evidence is clear he didn't see it.

But more than that, as you can tell from the evidence with your own good eyes and common sense, the rugs just aren't similar enough. So there can be no violation of the copyright law, period. Similarity, and the particular type of similarity that you see in these rugs, is far and away the most important thing you have to decide.

Now, it's not my privilege to explain the law to you. Judge Pauley will do that just before you begin deliberating. But your own good eyes and common sense will tell you that some of the similarities between these rugs are not the sort of

thing that a court or a jury should spend much time on. What do I mean by that? Well, the Tufenkian rug and the Nicholls rug are rectangles. Does that mean that one of them was copied from the other? Of course not. And why not? Because nobody owns the idea of a rectangle-shaped rug. But the claim being made by Mr. Nicholls here isn't really that much different. Because his rug has a grid of circles and Mr. Tufenkian's rugs both have grid of circles, or so the plaintiff says, James Tufenkian is somehow breaking the law. Now, it must be Mr. Nicholls' claim, because that's the only thing that these rugs share. The evidence will show you that James Tufenkian has every right to use a grid of circles in his rug. And the evidence will also show you that there are all sorts of other designs out there with circles arranged in a grid pattern. So

Mr. Shaw Nicholls no more owns that idea than he owns the idea of a rug in the shape of a rectangle.

Now, I'm going to be talking a lot about a grid of circles. What do I mean by that? I just want to draw quickly on the board over here. By "a grid of circles," what I mean is, if you take this as the outline of a rug, you've got circles here, here, here, here, here, here, and however large you want to make that repeat. What I mean is circles arranged in straight rows and straight columns, such you that might imagine that you could draw a grid through them like this. You would just have the circles placed on a grid, straight rows and

straight columns. Imagine a tic tac toe board with every space filled in with an O. That's what I'm talking about with a grid of circles.

Now coming back to the rugs at issue here, is there a resemblance, some resemblance, between the Prado design and the two James Tufenkian designs? Yes, there is. But the Court will instruct you that that's not enough. It's not the test for copyright infringement. There is a resemblance because both rugs have circles. But the evidence will show you that that's an idea. Mr. Moskin himself told you that they are not claiming to have invented the circle. There is resemblance because the circles are lined up in rows and columns. But, again, there is no monopoly in that for Mr. Shaw Nicholls. Arranging things generally in a straight-line pattern is an idea. There is a resemblance finally because the circles have horizontal sections of contrasting colors. And I want to pay particular attention to that, because I think that's a very important part of this case.

If I may just walk back to the boards, you will notice that there is a different approach to the horizontal color changes in these rugs. In the Shaw Nicholls design, it's just a portion of the circle itself that appears in a different color. I call it a dipped circle because it's a circle, if you imagine the circle as a cookie, you dip it into a cup of coffee or some chocolate frosting, you end up with a discoloration on

part of the circle. What you see going on in the Tufenkian designs is really different. It's really shading. It's the placement of a strip of color that goes over both the circles and the background. And it changes the coloration both in the circles and the background. It's as if there were strips of translucent fabric placed over the design and not simply a discoloration on one part of the design. So that's a very, very important distinction to make.

So what does the claim here boil down to? Well, the evidence paints only one picture really. Mr. Shaw Nicholls is attempting to claim circles arranged in a straight line with horizontal color contrast as his own private design vocabulary. And he basically says that in the complaint in this case. He claims, in a complaint filed in this action, that until he came along, there were no circles in oriental carpet design. Well, the rug in this courtroom has circles. And they're even in a grid pattern, for that matter. James Tufenkian, as you will see from the evidence, had circles on his designs for years, long before Mr. Nicholls came along and tried to lock them up by asserting this claim here.

The evidence will also show you that other people, besides Mr. Tufenkian and Mr. Nicholls, have used grids of circles too, in lots of designs. You can buy an Andy Warhol rug with horizontally shaded circles arranged in a grid. I will show that to you. But Andy Warhol doesn't own the idea

either. You can find rugs by a Scandinavian designer named Verner Panton that have all sorts of shaded and dipped circles arranged in a grid pattern. I will show those to you also. But Verner Panton doesn't own the idea, and neither does Mr. Shawn Nicholls. Neither does Mr. Tufenkian. Now, all of this doesn't mean that Mr. Shawn Nicholls hasn't created a protectable design. Truly he has.

In addition to these ideas, that are not protectable, like shaded circles in a grid, Mr. Nicholls will also tell you that he made dozens, maybe hundreds of creative decisions to give the Prado design the exact look that it has. And he did. He chose the exact size of the various elements, the precise spacing, the exact shape, the placement, the relationship between the round forms and the border. But the evidence is clear that none of those creative decisions were copied by James Tufenkian. I will map that all out for you and show you how James Tufenkian's rugs are different, in every one of those respects.

So in James Tufenkian's rugs, the ideas may coincidentally be similar, just as Mr. Nicholls' designs may coincidentally be similar to Andy Warhol's or Verner Panton's, but you can see for yourself the specific creative expression in these rugs is different, in every respect.

So let's start with the round elements. I like to just go back here and walk through some of these differences.

In James Tufenkian's rugs, the evidence will show you that, first, these round elements are not circles, or at least not consistently circles. They are very irregular oval sort of shapes. These are very precise circles, geometrically correct. On both the Eclipse and the Total Eclipse there are a variety of round forms. We may be calling them circles for shorthand in the course of this trial. They're not all circles. In fact very few of them are circles. Certainly none of them are true circles.

Also very visible to any eye is the size of the circles relative to the rug as a whole. They are more than twice as large on the Tufenkian rug as they are on the Nicholls rug. If you do the math, you can compare the surface area of this circle with the surface area of the rug as a whole. You will find out that it's about one 23rd of the entire surface area of the rug on the Tufenkian rug, and it's about one 50th on the Nicholls' rug. It's twice as big relative to the size of the rug as a whole. And also, going along with that, is the fact that you have 20 here on this design, with a border and lots of space in between. You have 12 in this design, and no border and very little space in between. So the circles are occupying a lot larger parts of the surface area of the rug.

Also, the spacing is very different in these two rugs, the spacing of the round elements. It's very precise here and it's very even row to row and column to column. It is not so

on the Tufenkian rug. On the Tufenkian, if you take a look, you will see that this column is further from the center than this column is. And that's intentional. This column is a little closer into the center. This column is a little bit further away. Same on the Total Eclipse.

Also, the spacing horizontal and vertical is very different. The Tufenkian rug, the spacing across, left to right, is wider than is the spacing up and down. And it's just the opposite on the Nicholls rug. You have much more space here than you do here. So you have a wider space going vertically than you do horizontally. And, as I already alluded to, it's the definition of the circles. It's the crispness of the edge. It's the sharp focus that these are in in the foreground design, as opposed to the Tufenkian rug, which presents them behind this sort of gauzy scrim of translucent color bars that are overlaid on top of the circles. These are sort of like little decorative plates hanging on a wall. What you have in the Tufenkian design is something much more complicated than that, where you have the circles sort of obscured by these other things that are lying on top of them.

So that's it for the round forms. The color contrasts again, as we talked about, they are very different just in terms of the way they're brought about, this with a sort of a shading by an overlay of a contrasting color, this by a sort of a discoloration of part of the circle itself. We've talked

about that.

But the way you can see that most clearly is to pay attention to the fact that the color change here stops with the outline of the circle. It doesn't continue across here. And if you look at what's going on here, the color, the discoloration actually goes across both the background and the circle and changes the background color as well as changing the circle. It doesn't just stop as part of the discoloration of the circle itself. It's another layer of dimension on the design.

Also, these color contrasts are in the same placement each row. These are exactly the same. Every circle here has about the bottom fifth or the top fifth exhibiting this horizontal color contrast. And it's the same for every circle. It's the same proportion. And it's a regular alternation. This one has the top shaded. This one has the bottom with the discoloration. This one has the top. This one has the bottom. It's a regular alternation. And there is one per circle, one per row.

What you have in the Eclipse and Total Eclipse is very different than that. You may have three. You may have two. You may have one. It changes from row to row. There is no regular alternation. It's much more freeform, much looser. Even in the Total Eclipse, this row has three. This has two. This has three that occur in different places than those three.

So they're not sitting the circles in the same places. And they're not alternating regularly top to bottom the way they do in the Nicholls design.

Finally what I would like to show you in the design here is the border, the frame, because you will see what happens in the Tufenkian rugs, there is no border, there is no frame. The circles bleed right out of the design. What's happening in the Nicholls' rug, the circles get out here pretty close to the edge of the design, but there is this clear frame on the left and the right and the top and the bottom that constrains what's going on inside the field of the rug and does in fact create a very strong border or a well-defined border on the rugs.

And finally, I would just like to show you that the top line of circles in the Nicholls rug are cut off. They don't continue on up. And that's a very strong sort of asymmetry that's clearly visible in the Nicholls rug that's not visible in the Tufenkian rug. There is a strong asymmetry that is visible in the Tufenkian rug, particularly in the Eclipse, which is the original design, the 2000 design, which is this area right here, which throws the whole design very much off kilter. The very asymmetrical top to bottom and left to right, unlike the Nicholls design there, this asymmetry is a very striking departure from this rug, and if in fact as Mr. Moskin claims, this is the rug that was copied from the Nicholls, I

think it's not a copy that is anything that any one of us would recognize as taking the heart and soul of the Nicholls design.

So when you get past the general ideas and you filter out those general ideas, circles in a grid, and you look at the actual detail and the expression in the parties' designs, there is just no similarity at all. In every particular, James Tufenkian has made different expressive choices as to the detail. And it's important for you to know that the similarities that are at any level are not the result of copying. James Tufenkian created his rug independently. The evidence will show you that he did not see the Prado design until long after he had made his works and just shortly before this lawsuit commenced when plaintiff contacted him at the end of 2003. James Tufenkian certainly never saw the Prado before he designed the Eclipse or the Total Eclipse. The testimony will prove that he wasn't sent one of those postcards you heard about. He didn't see The New York Times article that you heard about, regarding the Blanchette Rockefeller apartment. He certainly didn't see it out in the marketplace, because Mr. Nicholls sells about three or four Prado rugs a year, by his own testimony. That's the testimony I expect he will give you here. So it's not out there on the marketplace such that James Tufenkian would have bumped into it in the course of his travels in the rug business.

So the third-party material that I will be introducing

to you is very, very important to show you that, to the extent that there is any similarity at all between these rugs, it is no more similarity than you will find between any two other rugs featuring circles arranged in a grid pattern. And James Tufenkian was doing that before Mr. Nicholls came along, as were a number of other designers.

Finally, in conclusion, I would just like to touch on the issue of damages very briefly, because the evidence will show you, when we get to talking about the amount of money at stake in this case, that essentially there isn't any. The documents and the testimony will show you that James Tufenkian and his company have so far made not one dollar of net profit in the sale of the Eclipse and the Total Eclipse. You will hear testimony from the chief financial officer of Tufenkian's company about all the costs that are implicated in making these rugs and getting them to the market. Those costs are very substantial. They include the material cost of making the rugs, of course. But they also include shipping them halfway across the world, from Nepal, where they are made, here to New York. They include the share of overhead for all the staff and the facilities of the Tufenkian company, to bring those rugs over and put them into showrooms. It includes advertising expenses. It includes the cost of investing in inventory so customers don't have to wait six months when they order a rug. And when you do the math, and the testimony will walk you

through all of that math, all those costs are, so far, greater than the revenue that Tufenkian has brought in from selling these two designs.

So Tufenkian hasn't seen any gains from this. And maybe more importantly, Mr. Nicholls hasn't been harmed. As I said, I think he will testify that he sells about three or four Prado rugs a year and hasn't seen any falloff since the Eclipse and Total Eclipse came onto the market. Which makes perfect sense when you consider how dissimilar the rugs are in appearance, especially to the sort of sophisticated purchasers who represent the market for Mr. Nicholls' designs.

The evidence will show you that this whole lawsuit, I think you will agree, has nothing to do with any real harm to Mr. Nicholls' market for his designs. So there can be no doubt that when you have heard and seen all the evidence in this case and you have filtered it all through your own good eyes and common sense, you will come to the following conclusion: First, the James Tufenkian rugs are not similar to the Nicholls rug in any legally meaningful way. Second, James Tufenkian didn't see the Prado design before he created his two designs. Third, James Tufenkian didn't copy the Prado design. Fourth, Tufenkian has made no net profits from the sale of the Eclipse and the Total Eclipse. And, sixth, Mr. Nicholls has not been harmed by the sale of the Eclipse and the Total Eclipse.

I thank you in advance for your patience and I look

forward to presenting you with the evidence in this case.

THE COURT: Members of the jury, we have concluded opening statements in this case. Remember my warning to you earlier that opening statements are not evidence. But we're going to turn to the evidence in this case right now. And since the burden is on the plaintiff, plaintiffs go first in every case. So Mr. Moskin, at this time would the plaintiff please call his first witness.

MR. MOSKIN: Yes. Plaintiff calls David Shaw Nicholls.

If I may, your Honor, may we also distribute binders, exhibit binders, to the Court and to the jurors?

THE COURT: Yes, you may.

Members of the jury, you can take these binders and put them under your chair or hold them on your lap. Don't turn and leaf through them. I will tell you when you can look at a particular exhibit in the binder.

DAVID SHAW NICHOLLS,
the plaintiff herein,
having been duly sworn, testified as follows:

THE COURT: You may inquire, Mr. Moskin.

MR. MOSKIN: Thank you, your Honor.

DIRECT EXAMINATION
BY MR. MOSKIN:

Q. Mr. Nicholls, tell us, if you will, what it is you do.

A. I'm a designer. I, for 20 years I've been involved in the, specifically the high end of the market. Designing unique items in the home furnishings sector is my specialty. I'm an architect in Europe, unlicensed in the United States. But for 20 years I've been concentrating largely on the innovative end of the design frontier. So I've always been concerned and hired to come up with new and innovative products that would actually drive the market forward.

So in a nutshell I'm on the cusp of the design business. And I operate a design company that specializes in the design and manufacture and production of area rugs. That's what takes up most of my time.
Q. When did you begin designing area rugs?
A. My first rugs were designed approximately ten years ago. I came from Milan, in Europe, 15 years ago. I've been resident in New York City for 15 years. I trained in Scotland at the Glasgow School of Art. And then I trained in Milan, at an academy called the Domus Academy. And I set up the rug company ten years ago, here in New York City.
I think that answers the question.
Q. Thank you. Have you received any awards for your design work?
A. Well, I was always involved in very competitive high-end design environments. The awards I've received specifically for the carpet, the carpets I have designed, are a Roscoe Award,

which is given by Interior Design Magazine, which was given to me for my secret collection of flat-weave rugs. Again, these awards are given really for originality.
I also received an award in 1997 -- the Roscoe Award was, I believe, in 1994 or 1995. And as soon as I started the rug business, we were always, as I say, very concerned about being new and innovative because that really was the only way we could succeed in business, by having something that was unique. Following that, in 1997, I received an award from the International Contemporary Furniture Fair here in New York for the best of area rugs displayed there. And that was for my body of work and area rug designs.
Q. Have you been the subject of any publicity?
A. I got my first article published in House & Garden Magazine when I was 16 years of age, when I had a furniture design business. I have been quite extensively publicized for my design work. I should say I've probably been in over 100 to 150 magazines. I've actually brought photocopies of all the articles with me today for your perusal. Extensively in the United States, I should say most of the shelter magazines that you are familiar with. In Italy the market was interesting because most of the consumers were familiar with the names of the designers of the furniture. But here in the United States it tends to be the -- not so familiar with the names of the designers as the companies that produce them and market them.

But my own work, yes, I've been published extensively. Elle Decor, Metropolis Magazine, House & Garden. I've been published in Japan. I've been published in, all over Europe. And as I say it's -- there's various spheres of my work. The office I worked in Milan was very graphic -- we had a very strong graphics design department. We also had a product design department. And I was involved in the architectural department and the graphics design department.

So the look of something for me has always been of prime importance, not just the fact that it has to function and it has to perform, but my success, however modest, has been driven by the need and the enjoyment, if you will, of being innovative.

Q. I'd like to -- we may come back and talk about some more of your -- some of the publicity. But I would like to focus the --

A. I could sit and rattle off a hundred magazines, but I hope the books show some of them. If they don't, as I say, I have those here.

Q. We may come back for a little of that later on, but I'd like to focus very quickly on the Prado design. And if I may show you what has been identified as Plaintiff's Exhibit 1 and ask if you can identify that for us.

A. This is a certificate from the United States Copyright Office. The number is described as VAU524-511 for the Prado

rug designed by myself. And it contains a color image of the design and one of the size points, which is an 8 by 10. And that's a black-and-white line drawing. And some other -- seal on the back page. And also there is a copy of the certificate with some description of the product. It also outlines the date of origination, which is 1998.

MR. MOSKIN: I would like to offer Plaintiff's Exhibit 1 in evidence.

THE COURT: Any objection?

MR. CLARIDA: No objection.

THE COURT: All right. Plaintiff's Exhibit 1 is received in evidence.

(Plaintiff's Exhibit 1 received in evidence)

Q. If you will look at Plaintiff's Exhibit 1 --

MR. MOSKIN: And may the jurors also --

THE COURT: You want to publish it to the jury?

MR. MOSKIN: Yes, I would like to publish it to the jury.

THE COURT: You may publish it to the jury.

Members of the jury, you can turn in your looseleafs to the tab marked Exhibit 1. Don't look at any other exhibits, but let's just focus on Exhibit 1.

You may proceed, Mr. Moskin.

Q. If you will look at the last page of -- excuse me -- the second-to-last page of Exhibit 1, next to the number 3 in the

left-hand column.

A. Yes.

Q. You see there's an asterisk and the date 1998?

A. Yes. Well, that -- sorry.

Q. Do you know why that date appears there with an asterisk?

A. Yes. The date appears with an asterisk because in our

infinitely efficiency in the administrative department, we forgot to fill that in when it was submitted to the Patent Office, my secretary, and then it was later filled in after we verified the origination date as a result of a phone call, a contact we received from the Patent Office.
Q. Have you brought with you any samples of what the Prado rug actually looks like?
A. Yes. I have brought construction samples.
THE WITNESS: Can I walk around? Is that allowed?
THE COURT: Yes. You can step down.
THE WITNESS: Thank you.
A. When you make area rugs, very often you produce what are called strikeoff samples. These are scaled pieces of the actual carpet. They don't represent the entire rug, but this is a vehicle for communicating to your customer the size and shape and style of the motifs. It's presented alongside a full-size illustration of the rug. But this will give an excellent example of the pile height and any type of coloring involved in these samples.

Q. Before you go any further, I think we need to identify these as exhibits. If we can identify them as exhibits, Plaintiff's Exhibits 2, 3, and 4, so you can refer to them as such.
A. These rugs are made in Kathmandu.
THE COURT: Perhaps, before we go further, are you going to offer these in evidence?
MR. MOSKIN: I will.
THE COURT: Any objection?
MR. CLARIDA: No objection, your Honor.
THE COURT: Plaintiff's Exhibits 2, 3, and 4 are received in evidence.
(Plaintiff's Exhibits 2, 3, and 4 received in evidence)
A. These three samples represent two of the color ways that my company offers. They also represent, I believe, a 9 by 12 full-size rug. The two qualities illustrated are 100-knot quality and, respectively, 60-knot quality.
This is the -- we call this the Ermine color way, and this is called you are Tawny color way. In fact, for Philip Johnson, this design was the one that he selected for the Rockefeller home.
Q. When you say "this one," which one are you referring to?
THE COURT: Right. For the sake of the record, Mr. Nicholls, I'm going to ask you, when you can, to refer to

the particular sample by its exhibit number.
THE WITNESS: Oh, OK. Excuse me.
A. Exhibit No. 4 is the rug that was illustrated -- which was featured in The New York Times article. And that's one of a series of color ways we do. You did see on the drawing one

color way. We have, I believe, six color ways, as standard production color ways of this particular design.

The design is also produced in 6 by 9 size, 8 by 10, 9 by 12, and 10 by 14. Now, it's important that you understand that the amount of elements in these different sizes can vary with the size of the rug. But to be quite accurate about it, these are 9 by 12 corner samples. So you would have to make comparison, if you will, to the full-size drawing in order to understand the general look of the item.

They are also labeled on the back. We have a Nicholls label on our products, which are sewn on at the factory, actually. And then we have our own branded name. And the tag usually accompanies the piece and describes the size, the quality of the item, and may or may not display a price point.

Q. Mr. Nicholls, first I would like to show you what has been identified as Exhibit 46.

If I may, if I can first show you what has been marked as Exhibit 46, can you tell me what that is?

A. Yes. This is the label we affix to each and every item we make. It has the name Nicholls. It has a copyright symbol

that is attached to our products. And it's unique to our company. It's our brand identity. It's affixed, as I say, at the factory where we produce these carpets.

MR. MOSKIN: Your Honor, I would like to offer Exhibit 46 into evidence and publish that to the jury.

THE COURT: Any objection?

MR. CLARIDA: No objection, your Honor.

THE COURT: Plaintiff's Exhibit 46 is received in evidence.

(Plaintiff's Exhibit 46 received in evidence)

A. And it clearly states, excuse me, that the copy -- it clearly states in English "copyright of David Shaw Nicholls, all rights reserved." I think I'm legally supposed to mention that.

Q. I would also like to show you Exhibit 44 and ask you if you can identify that.

A. Exhibit 44 is a direct print from our Web site, which actually features the Prado rug as the home page, front page. The Prado rug, for us, is a very important design to the extent that it is a, what we consider to be a very high-profile design for our company. And this page in fact is a direct printout from the Web site showing three alternate color ways that we offer for this design. And I believe this was printed very recently, from the Web site.

MR. MOSKIN: I would like to first offer Exhibit 46 --

excuse me, is it?

A. 44.

MR. MOSKIN: I'm sorry. Exhibit 44 in evidence.

THE COURT: Is there any objection?

MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 44 is received in evidence.
(Plaintiff's Exhibit 44 received in evidence)
MR. MOSKIN: And ask that the jury may refer to that as well.
THE COURT: Certainly. Members of the jury, you can turn to the tab marked Exhibit 44. But it's a photocopy.
MR. MOSKIN: Yes.
THE COURT: So to the extent that Mr. Nicholls is talking about colors.
THE WITNESS: Yes. I see the color one here.
JUROR NO. 5: The next page is in color.
THE WITNESS: The next page.
THE COURT: All right.
Q. And how many color ways are there in total?
A. There's about six color ways that we've developed for the Prado design.
Q. I would like to go through with you the development of the Prado, how it came into being, and begin by showing to you Plaintiff's 5, 6, and 7.

THE COURT: Members of the jury, just hold off on looking at exhibits that counsel is referring to until he has offered them in evidence and I have received them in evidence. I'll tell you when to turn to an exhibit.
Q. And if you would please just identify these exhibits for us.
A. OK. Well, Exhibit 5 are computer renderings that we produce in our company of a design which I called Rio, and it features circles. Exhibit 6 are a series of sketches done by myself as an evolution of the design process. Exhibit 7 is another indication of the experiments I went through in the creative process of developing the Prado design.
The Prado design actually started as the Rio design in my company. And --
Q. If I can interrupt for a moment --
A. Sure.
MR. MOSKIN: I would like to just first, before we go through this, if we could offer these in evidence so the jury can follow along?
THE COURT: Objection?
MR. CLARIDA: No objection.
THE COURT: All right. Plaintiff's Exhibits 5, 6, and 7 are received in evidence.
(Plaintiff's Exhibits 5, 6, and 7 received in evidence)

Q. And now if you would, Mr. Nicholls, if you could explain the relevance, if any, of these designs on these pages to the development of the product.

A. Yes. The Prado design was developed by my company for -- we had a very successful design. And it's actually, it's still a high -- a desirable design for us, which is the Maui design.
Q. If it would help, should we, can you identify the Maui design.
A. Sure. The Maui design was one of the first Tibetan carpets I designed.
Q. First of all, if you can identify what the Exhibit 14 is.
A. Exhibit 14 is a photocopy of a Maui design, and this particular one is a runner, size 3 by 12. And again it has our copyright symbol on it.
MR. MOSKIN: May I offer Exhibit 14 into evidence?
THE COURT: Any objection?
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 14 is received in evidence.
(Plaintiff's Exhibit 14 received in evidence)
MR. MOSKIN: And may the jury refer to that?
THE COURT: Yes. The members of the jury can turn to the tab marked 14 in your looseleafs.
A. And this rug, in fact this very item, was made by Tufenkian Carpets.

The process of development from the Maui, I was under pressure in my company by myself to come up with another good design that would follow on the heels of the Maui design. And the way I went about that was, I tried to define certain elements of the design that I felt were important and at the same time understand a direction I could go in to retain what I felt were important parts and then bring something new to the table.
The Maui design -- can I draw on this board here, just to illustrate it?
MR. MOSKIN: You're asking the Judge. If it's all right with the Judge, it's all right with me.
THE COURT: OK.
A. Because the Maui design had these circles of two different colors. This is a runner proportion. Clearly in an area rug it would be a rectangle, as Mr. Clarida refers to. But we actually do runners as well and rectangular rugs. So the shape of the defined perimeter doesn't always lend itself to the true design content that you, the process you go through.
But anyway, when I was designing the Maui rug, one of the details of it was the fact that it had these scroll elements in it. And the scroll element actually was a very strong design statement. And what I was trying to do, if I was going to come up with something that was quite different from that, was remove the scroll entirely from the design. And then

I was reduced to doing a very simple graphic, which I called the Rio design.

Now, I made some samples of this design, but it wasn't --
Q. What are you referring to now?
A. The Rio design.
Q. What exhibit number?
A. This is Exhibit 5.
Now, the Rio design is like the Maui, if you take out the scrolls and you take out some of the framing elements.
So getting back to basics, I was reduced with a series of circles on a rug. Now, that was just simply not important enough as a design detail. And because we are in the business of trying to come up with something that's totally innovative and interesting and important, the idea was, what do you do with a group of circles in order to give it some sort of sensibility? Well, the Exhibit 6 and Exhibit 7 will take you through a design development process that in fact led to the creation of the Prado design. And it's a very carefully orchestrated process. This isn't, I don't grab designs out of the sky. And I don't grab them out of the media. They come from a design process as a professional I've been doing for 20 years.
So the sequences of the process of development led to the Prado design that you see on the board. And hopefully I

can illustrate how that process happened so that it wasn't merely haphazard.
Q. Well, can you explain to us how, starting with Exhibit 5, how the array of circles changed, looking at the presentation of circles on the page, first page, and how it changes from the -- over the next ensuing pages?
A. Well, the first element I tried to do was arrange the circles themselves in a manner that gave them a certain dynamic.
Q. What are you referring to now?
A. Well, when I refer to -- I'm using as an example -- I -- it's an 8 by 10 Rio design and it came out of Exhibit, gosh, very bad at this -- Exhibit 5, which is a collection of size points of the Rio design.
Q. Is there a number at the bottom of that page, DSN?
A. Yes. It says DSN000050. And already I was starting to try to lay the circles out in such a way that there was an element of unique composition to it. When you look at the Prado design, which I'm going to refer to no. 44, you will see that the circles started to be placed in a very regularly spaced idiom. This is not haphazard. Now, now, I suppose Mr. Tufenkian and his counsel can say, oh, well ours is an inch this way and an inch that way. But there's a very lengthy design process that causes you to start to arrange elements in a specific way. And then when you start by setting the circles

and you continue to develop details within the design, that's when you start to establish the uniqueness of the product. And it's that uniqueness that I will show you that makes that Prado design, other than the Eclipse, unique on the market. And the decisions that go into it -- and also in relation to the manufacturing process, because there is a manufacture -- in the manufacturing process of Tibetan carpets, there is an inner quality to the fact they're handmade. And that is something that can be recognized, from a design standpoint, to give uniqueness to what might normally be considered a mundane circle.

Now, these are not tufted rugs. And tufted, by the way, is a process that compromises the beauty of a hand-knotted carpet. So the very idea that you're going to make circles and you're going to incorporate a quality as a consideration in the design process is very, very important.

So the process of design development that I went through -- and don't forget at that time I was supplying designs to the Tufenkian company. The Maui designs were still being made when I started the Prado design. And when our Prado went on the market, there was nothing like it.

Well, anyway, I could go on, but I should stick to the thing.

Q. If you could go on to explain how the Rio evolved into what's now the Prado.

A. Well, the Rio design, the circles started to get bisected in a horizontal manner. In the computer, when you're designing on the computer and you're laying down what are in fact just black-and white images, you can do what's called cloning and you can take the area and then you can pass it down, and very quickly you have the opportunity to experiment with design. And the way the Prado design was developed was, I had this Rio model in the computer. Granted, there was maybe four circles there, excuse me, if you want to do that. But the fact was when you're working with a computer and you freeze this area, you actually clone it, and then you take it down and you reproduce it down here, it's actually -- it is like an overlay. The process is like an overlay, the way that the Tufenkian company -- lawyer described that overlay, because it really does happen in the computer. But what I ended up with was an opportunity where, by doing that overlay, I could darken an entire part of the circle.

Now, at the same time, I could start to come up with something that was unique. So going through an evolution process -- this, by the way, from start to finish from the Rio to the Prado, it's weeks of design work, sampling, sending to the factory to get samples in. The creative process can be very fast. But you have to make sure that the product can also be simultaneously be being produced.

Now, it was important for us to try to get the circles

round, because I wanted that feeling of roundness. The interesting thing about his rugs is, they start -- the circles started to get rounder and rounder. So the first time when I ever made circles in a carpet they came in like egg shapes. And I have pictures here to show that. So when you see his pictures of egg-shaped circles and how that was a pattern of beautiful design, it's very strange how they started to get perfectly round and then they started to get rounder and rounder. And then the idea of the overlay suddenly disappeared and then we ended up with something that was much more gridlike and the composition was much simpler and more straightforward.
Q. Can you explain to us what we're looking at, Plaintiff's Exhibit 5, the last three pages of it, which are numbered DSN00054, 0055, and 56.
A. Sorry. Just bear with me here. 52 -- what were the numbers again?
Q. 54 to 56.
A. All right. 54. Too many numbers here, John.
This is a handsome -- DSN0054 is a hand drawing by myself, which actually shows how I was working with the Maui design and I removed the scrolls and then I started playing with the overlap. That's one of my -- that's a photocopy of an original sketch that I was doing when I was taking the Maui design and going through a synthesis of the process to try and take out the scrolls and see how I could come up with a new

composition, because our company, that Maui design was quite special for us as an icon of the firm. And I was quite determined to try and retain the strength of that imagery but at the same time be innovative in how I developed this new design. So that's our sketch by myself.
Q. If I can interrupt, what are the notes that appear on the right hand there?
A. The notes that appear, it says "Maui 1998, shade contrast creating repeat with planning." These are words I used. So the contrast was important and the planned repeat of the way these overlays took place. And I wrote "Maui, no scrolls." And at the top there is the same colors as the flat-weaves to start with. And my flat-weaves are earth tones. We're also known quite well for earth-tone carpets. And my first production of the Prado design were earth-tone carpets because that's a very large -- when you do modern rugs and you can incorporate nice earth tones and camel tones and wheat tones, the appeal is enlarged. But then people were -- I was also recognizing the fact that we need -- we had a body of strong-colored rugs as well that we were developing. So -- and the other note on the left says something about Sharmacher and Patterson Flim Morton, because I was in the D&D building in New York at that time.
Q. How about the next page, DSN0055, still part of Exhibit 5.
A. DSN55, these are a series of pictures from our showroom

which show our flat-weave collection and various circular motifs that were quite a strong part of that collection. And I was playing with the idea of how to break up these circles and fashion them into a repeat of interest. And I can't read my own writing here. "What about circles without the scrolls?" I was obviously trying really hard to get rid of those scrolls. And then there are some notes at the bottom of the names of the design. Because I wanted to name the collection after a museum and I wrote "MOMA, Tate, Guggenheim, Louvre, Prado." And I figured the best one I could get away with was Prado. So that's where the name Prado came from.
And that's what this is, this huge paper.
Q. If you could turn to Exhibit 6 and explain to us what we're looking at there.
A. Exhibit 6 is, that's the Rio template and these are pencil drawings, overlays on the template, and my attempt to try and bring a stronger design element to what otherwise was obviously just a repeat of circles. And it's a 6 by 9 size. And the reason it says there are three rows of circles as opposed to five or six or ten, is because that's a 6 by 9 scale design.
So when you start seeing pictures of rugs in some of the five circles or eight circles, very often the rug itself, the size of it, and the proportion of those circles, is important. But the idea that there are six circles on this and you're constantly seeing numerous circles appearing on my rugs

is very often in relation to the overall size of the carpet itself.
Q. Were you considering leaving the center portion of the rug --
A. Yeah, well --
Q. -- empty, without circles?
A. Yes. In this particular one, the idea was, well, maybe I should capture an area of blank field and give that centerpiece, which looked rather empty without it, a different color, a different overlay. It didn't fly. I didn't really, I didn't go in that direction. But at that time, yes.
Q. And how about the next page, 59, what are we looking at there?
A. 59 is a page printed from our Web site of this earth Salim design. And this is my, again, drawing over the design with scrolls to try and understand the relationship of those scrolls. I'm not sure of the time frame here, whether this was prior or after the number 58, but it's around about the same time. And the idea of the overlays and the important relationship between some sort of balance between the darkness and the lightness on those circles. And the illustration at the bottom is, again, a further development of the design process to try and somehow define better how these circles could be bisected.
Q. How about Exhibit 7? Can you explain what we're looking at

there? Exhibit 7 is pages DSN292 through 298.
A. I'm sorry, what were those numbers, the DSN numbers?
Q. 292 to 298.
A. Well, I have 293 in my hand, which actually appears to be my original, which is another attempt to try to break up these circles in such a way that the design becomes interesting. It was -- I was still trying to figure out what the best proportion between the circles was, and I was getting the feeling that there had to be an overall grid of circles, as opposed to lines of circles with this space in the middle. So, in other words, the general field of the carpet was composed of the circular elements and their bisections.
Q. You -- we --
A. There's 296 also, which is a sketch on the Rio design. Again, it's part of the -- it shows clearly how the Maui 3 by 9 rug -- I'm looking at no. 296 -- how the Maui rug could -- I was just trying to understand the graphic strength of the Maui design and see how, through a design process, through development, I could somehow rework the use of the circle motifs and the overlaps.
Q. Did any of your earlier, completed rug designs influence the creation of the Prado?
A. Well, the Sikri collection, which is in fact featured in no. 55, which are those pictures --
Q. No. 55, which is page 55, which is part of --

A. DSN0055.
Q. Which is part of Exhibit 55, right?
A. Yes. Well, those designs predominantly were flat-weaves with circular motifs, very challenging to manufacture. That's what I received the award, the Sikri, that was what I received the award from Interior Design Magazine for. The Roscoe Award was for that collection. And that was a strong influence in the design of the Prado.
Q. I would like to show you what have been marked as Exhibits 8, 9, 10, 11, 12, 13, 15, 16, and 17. And if you would just first quickly identify them so we can see if they can be offered in evidence, before you explain what they are.
A. Exhibit 8 is my very first collection of rugs that we attempted to make in a hand-knotted quality. And this collection is dated 1995. And the names are Provence, Palominova, Biaritz, and Luxor. And the design Biaritz was the forerunner for the Maui design.
MR. MOSKIN: I would like to offer Exhibit 8 in evidence.
MR. CLARIDA: No objection.
MR. MOSKIN: And I would like to request that members of the jury can refer to it.
THE COURT: Plaintiff's Exhibit 8 received in evidence.

(Plaintiff's Exhibit 8 received in evidence)

THE COURT: Yes. Members of the jury, you can turn to the tab marked 8.

A. And the design Biaritz is the one in the lower right-hand corner which shows the arrangement of the circles with the scroll detail set in place.

Q. Can you explain to us, what is Exhibit 9.

A. Exhibit 9 is a computer printout of one of our flat-weave designs which is called Vegas, and it's a very good example of the flat-weave collection, which, the flat-weave collection consists of about 20 patterns, of which about 18 deal with various ways of composing circular motifs within frames and thereby sections and the relationship between the cut parts and the remaining sections.

MR. MOSKIN: I would like to offer Exhibit 9 in evidence.

MR. CLARIDA: No objection.

THE COURT: Plaintiff's Exhibit 9 is received in evidence.

(Plaintiff's Exhibit 9 received in evidence)

MR. MOSKIN: And ask if the jury can refer now to Exhibit 9.

THE COURT: Yes.

A. Exhibit 9 also has a lot of color information on it. Those numbers refer to shades of color. It's quite a technical endeavor.

Q. You have referred to -- you have used the term "flat-weave." What do you mean by that?

A. A flat-weave is an area rug that's woven in such a way that there is no cut pile. The terms that one tends to be familiar with are kilim, dhurrie, that type of quality.

Q. Those are types of flat-weaves?

A. Yes. And we call these flat-weaves because we try to take extra care to make sure that they are as tightly woven as possible, the clarity of the designs is as sharp as possible, and hopefully that the circles will be as round as possible, and that the composition will be clean.

Q. How does that differ from, you've said cut pile? Is that what you used?

A. Yes, a cut pile. A Tibetan product is an example of what I would term a cut-pile rug, where the wool is knotted and then is cut in a certain way to actually fluff up the fibers of the wool, which then of course results in a carpet with pile.

The flat-weave product, the yarn is not cut and definitely not plumed up, and in fact the yarn itself was woven quite tightly, and by knotting it, it gives, as I say, more of a fabric quality to the final product.

Q. When did you create the Vegas design, Exhibit 9?

A. The Vegas design was created around about 1994, 1995.

Q. How about the next design?
A. Perhaps even prior to that. We were basically in business

for about two years when the flat-weave collection was put on the market. So --
Q. How about the next design, the Ravenna? Can you tell us --
A. The Ravenna design is also a flat-weave design. And that was one of the first flat-weaves we did. This drawing is dated 1994. Again, it's a computer rendering. And this particular size, I believe, is the 6 by 9 size, this illustrated.
MR. MOSKIN: I would like to offer Exhibit 10 in evidence.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 10 is received in evidence, and you may publish it to the jury.
MR. MOSKIN: The jury.
(Plaintiff's Exhibit 10 received in evidence)
Q. Can you identify for us Exhibit 11.
A. Well, Exhibit 11 is actually the same design and is wrongly named. It should -- it says "Portico," and the Portico design is not -- this is not the Portico design. So we have a typo here or the wrong image. But this is very clearly another image of the Ravenna. So the Portico, which is which is -- is not reflected on this page.
Q. All right. Well, let's pass on to Exhibit 12.
A. Exhibit 12 is the Sikri collection, which is the flat-weave collection for which I received the Roscoe design award.
MR. MOSKIN: I would like to offer Exhibit 12 into

evidence.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 12 is received in evidence.
(Plaintiff's Exhibit 12 received in evidence)
Q. When was this created?
A. That would be 1993 or 1994. And those are, you know, this particular flat-weave collection, the Sikri collection, we, I should say we produced after being in business about a year and a half, two years. So around about 1992, 1993, in the design stage. Bearing in mind, there is -- time goes into the development for the launch.
MR. MOSKIN: I'm sorry. Did I offer 12 in evidence?
THE COURT: You did.
MR. MOSKIN: I did. Thank you, your Honor. And I would ask that the jury be permitted to look at it.
THE COURT: Yes. Members of the jury can turn to the tab marked 12.
MR. MOSKIN: Thank you, your Honor.
Q. Can you identify for us what's been marked as Exhibit 13?
A. Exhibit 13, this consists of two sheets of paper, and this is the Umbria collection, which consists of six designs. And

in fact the Portico design is collectively shown here. So we have the Portico, Trigger, Ravenna, Domino, and Caprillo designs, and the Palio design. These are all flat-weave rugs

that were done on or around 1995, 1996.

MR. MOSKIN: I would like to offer Plaintiff's Exhibit 13 in evidence.

MR. CLARIDA: No objection.

THE COURT: Plaintiff's Exhibit 13 is received in evidence.

(Plaintiff's Exhibit 13 received in evidence)

MR. MOSKIN: And may it be published to the jury?

THE COURT: Yes. Members of the jury, you can turn to tab 13.

Q. Can you identify for us Exhibit 15.

A. Exhibit 15 is the Cosmo Cities collection, another collection of flat-weave rugs, and here we see the Vegas Cologne runner, Hanover, and Atlanta. The Atlanta rug obviously is a round rug with circles inside it.

MR. MOSKIN: I would like to offer Exhibit 15 in evidence.

MR. CLARIDA: No objection.

THE COURT: Plaintiff's Exhibit 15 is received in evidence.

(Plaintiff's Exhibit 15 received in evidence)

MR. MOSKIN: And may the jury view Exhibit 15?

THE COURT: Yes, they may.

MR. MOSKIN: Thank you.

Q. And Exhibit 16, can you identify that for us?

A. Exhibit 16 is the Constantinople design, one of the first Tibetan products that we developed. And this particular rug was made by Tufenkian. And this is a, I believe, a 6 by 9, which is termed as a 5 foot 6, 8 foot 6 size rug.

THE COURT: You refer to it as a Tibetan product.

THE WITNESS: Yes.

THE COURT: What do you mean by that?

THE WITNESS: In 1959, the Tibetan people for the most part were annexed out of the country of Tibet and settled in cath man due. And the techniques and processes they brought with them were first developed in the country of Tibet and so -- and the wool itself is Tibetan wool if it's coined as a proper Tibetan carpet. It's actually made in the country of Kathmandu, by for the most part refugees from Nepal. And as we know, the Dali Lama went to India to get away from the Chinese takeover. But as a Tibetan product, it's a specific knot. It's a specific construction technique. And the dying techniques and the finishing techniques are synonymous with the Tibetan process. And as I say for the most part it's made by Tibetan refugees, even although it's not usually made in the country of Tibet, which is a neighboring country.

MR. MOSKIN: I would like to offer Exhibit 16 in evidence.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 16 is received in

evidence.
(Plaintiff's Exhibit 16 received in evidence)
BY MR. MOSKIN:
Q. And Exhibit 17, could you go through that for us.
A. Exhibit 17 is the Argyle design, which is very similar to the Constantinople, only the colors in the Argyle design are very bright, blues, greens, reds, and the Constantinople design is very earth-toned, browns, and honey wheats, softer hues. These photocopies unfortunately don't represent the color values, but they do represent in quite clear detail the experiments of how to break up -- in fact, these were not circles. These were oval shapes. And specifically that was the notion of that design. But the idea of course was how to break up the shape.
MR. MOSKIN: I would like to offer Exhibit 17 in evidence.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 17 is received in evidence.
(Plaintiff's Exhibit 17 received in evidence)
MR. MOSKIN: And ask that the jury be permitted to view it.
THE COURT: Yes. You can turn to the tab marked 17.
Q. The exhibits we've been looking at, Exhibits 8, 9, 10, 12, 13, 14, which is the Maui we looked at earlier, 15, 16, and 17,

do these relate in any way in your mind to the Prado design?
A. What you see, through all these sheets of paper and all these various designs, is the growth of a body of work which spans for the better part of six or seven years of work. All of these designs, by the way, are done by myself, personally. I don't -- I don't hire outside designers to interpret my sketches. These are all developed by myself.
But what it perhaps will show is a development of thought, a signature development of the style and work of my operation, of my company. And we make our design process very seriously. That's why we strive to go through enough experimentation to hopefully at the end of the day come up with something that is absolutely special to our company. Otherwise we don't stand a chance out there. The day other products start looking like mine, I'm finished, completely. That's why it's -- I'm hellbent on making sure that there is a unique quality and a unique look to these products. And hopefully what this example shows is a consistent strain of thought and a development of a body of work, because that's really what this should reveal, that there was an evolution of a design

process -- and products, by the way -- at the end of the day. These aren't just sketches for the fun of it. These are actual products that go on the market.

But that's what I would like to think is revealed in this, a development of thought and work, which of course leads

up to the Prado design, which is why we're all here, because the Prado design is the most recent example of how this process developed from our Sikri collection back in 1994, to the present day.

Q. Do you have any, does your company have any records when this, the design process was completed for the Prado?

A. We certainly do. And the -- I'm asking because I'm hopeful, I'll submit, that that -- I'm certain we'll -- yes, we do, is the answer.

Q. I'd like to show you what have been marked as Exhibits 18 and 19 and ask you if you can identify these.

A. Exhibit 18 and 19 are printouts from our Macintosh computer, the computers that are used in the design lab. And Exhibit 18 shows, under a file called "Tech Drawings," a list of the various designs that were part of our portfolio of product. And the Prado design is shown at the bottom of page 1. And in fact the file has been opened up to reveal various custom versions and some standard versions of the Prado design.

MR. MOSKIN: I would like to offer --

A. And it's dated November 6, 2002, the date this was printed out.

Having said that, there are Prado drawings being done. I see one here in October 26 of the year 2000 at 7:01 p.m., a 6 by 9 Prado design.

Q. If I may, before you go on, if we could first offer this

into evidence, Exhibit 18.

THE COURT: Any objection?

MR. CLARIDA: No objection.

THE COURT: All right. Plaintiff's Exhibit 18 is received in evidence.

MR. MOSKIN: And I ask if the jury can look at this as well.

THE COURT: Yes. You can turn to the tab marked 18.

Q. And perhaps you can explain so the jury can follow along where you find the earlier or earliest references to the Prado.

A. Well, I'm looking at Exhibit 18, under, as I say, tag drawings, the Prado -- these are folders obviously containing the drawings, and the Prado folder is at the bottom, and it has been opened up, and the size and some description of the designs. These little logos represent the actual design file itself. And then in the "date modified" column is the date when that rug was worked on for the last time. And I'm drawing attention then to approximately the middle of the page, and I see --

Q. The middle of which page?
A. Page 3. And if I want to scrutinize it, I see 8 by 10 1998, Prado October 21. I see 12 by 16 Prado, October 21, 1998. And then I see various designs coming in in September of '99, and then so on and so forth, 2000, 2001, 2002. So that's tabbed as page 3 on Exhibit 18.

Q. Now, do all of these references to the Prado on page 3 of Exhibit 18, do these refer to actual carpets you created for sale?
A. Yes. Yes, they do.
Q. So can you, just look at this page in this computer file, how many sales does this refer to, or rugs produced does this refer to?
A. I would say there must be about 40 there.
Q. And can you identify for us what's marked as Exhibit 19.
A. Exhibit 19 has the Prado group highlighted, dated October 21, 1998, and this illustrates, I would say, five rugs --
Q. Can I interrupt for a moment. First just tell us what is Exhibit 19.
A. Exhibit 19 is another computer printout from our database of the design lab, and this is a different computer, actually, because the other one is Macintosh HD -- hard drive no. 2. And this is a different one. And I'm saying that because it's in a different drive. This is in a drive of tape drawings.
Q. It's different computer data.
A. Yes, different computer database.
MR. MOSKIN: I would like to offer Exhibit 19 in evidence.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 19 is received in evidence. Members of the jury, you can turn to the tab marked

19.
(Plaintiff's Exhibit 19 received in evidence)
Q. Can you now, now that the jury can follow along with you, can you identify where you see references to the Prado?
A. Yes. There is a reference to the Prado just about two inches from the foot of the page. And it says "Prado tech drawings." And it shows different sizes, different -- of the Prado design. And in fact it shows them dated October 21, 1998.
Q. And again, do these --
A. This constitutes rugs -- this constitutes rugs that would be being produced, that is correct.
Q. Thank you. You're anticipating my next question.
THE COURT: Mr. Moskin, is this an appropriate place to take our mid afternoon recess?
MR. MOSKIN: That would be fine.
THE COURT: All right. Members of the jury, we will take a mid afternoon recess now. It's going to be a short

recess. There are some refreshments waiting for you in the jury room. Please don't leave the jury room because we're going to be reconvening in ten minutes.

Leave your binders on your chairs, but take your notebooks with you.

Please recess the jury.

(The jury left the courtroom)

THE COURT: All right. Mr. Nicholls can step down. Any issues that counsel want to raise?

MR. MOSKIN: Not I.

MR. CLARIDA: Your Honor, just in terms of the procedure for admitting documents into evidence, I have a number of things that I know are third-party materials and I know we're going to be dealing with those one at a time. I'm just wondering if I can explain to you what my proposed relevance is so we can deal with that before having to do it in front of the jury.

THE COURT: All right. How much longer do you have on direct?

MR. MOSKIN: Perhaps 45 minutes?

THE COURT: All right. I will hear you in a couple of minutes.

MR. CLARIDA: OK. Thank you, your Honor.

THE COURT: All right. But I want to bring the jury out and keep going. All right?

MR. CLARIDA: Yes, your Honor.

(Witness excused)

(Recess)

(Jury not present)

THE COURT: Before we bring out the jury, Mr. Clarida, you want to be heard?

MR. CLARIDA: Yes, your Honor. On the issue of the

third-party evidence that we propose to introduce, I understand there is a challenge from Mr. Moskin on the grounds of relevance and I just thought it might be expeditious to resolve at least some of that so that we don't have to stop and have objections every time we want to introduce an exhibit.

As I noted in our trial brief, I believe these third-party examples are relevant to show several things. First, they are relevant to show that this arrangement of circles in a grid is familiar in the industry. It's the same familiar circle design. Copyright doesn't attach to it. I think they are relevant to show this.

Also, a good many of these predate Mr. Nicholls' designs. And I think it's fair to ask him if he saw them and considered them when he made his design decisions in connection with the Prado.

So for those reasons I think we can clear up the relevance issue and I can just simply ask, as Mr. Moskin has been doing, can you turn to exhibit such and such and we can proceed that way.

MR. MOSKIN: We have already laid out in our motion in limine reasons why these are apparently not relevant, including in particular that in deposition testimony when they had an opportunity to show Mr. Nicholls most of these designs, there are, well maybe half of them -- in the last week I've gotten another ten or so new designs they pulled off the Internet more

recently. But the ten that he was shown at his deposition and that were produced in discovery he had never seen and they didn't influence him. Likewise, Mr. Tufenkian, I in turn showed the same exhibits to him, and he said they didn't influence his design at all.

I can't obviously say for certain -- and we discussed in your Honor's robing room on Friday -- that one of the witnesses -- that Mr. Nicholls might not now say, you know, particularly some of these new designs, that, yes, I've seen that one before. But as far as -- and if they influenced his design making, then I can understand they might be able to establish a basis of relevance. But as far as scenes of the fair is concerned, there is no indication that these are widely sold, that any of them were made -- these were all pulled off the Internet very recently -- that these were sold in any quantity, that they are known widely. They have no broader meaning than a piece of paper. I could go up to, just as Mr. Clarida did in his opening statement, go up to the board and draw a bunch of circles on a piece of paper. Those exhibits have no broader relevance than that. If they are admitted, I think there should probably be an instruction to the jury that they shouldn't be considered for anything more than something that may or may not have influenced one of the designers here. But they clearly, they have no expert in the case. And the paralegal who pulled them off the Internet is

not competent to testify that these have any greater significance in the design world than anything else you can pull off the Internet.

THE COURT: At the end of the day, Mr. Clarida, you can show these exhibits and confront the plaintiff on cross-examination, but if he says that he never saw them and they didn't influence him, how are they relevant?

MR. CLARIDA: They are relevant to two things, your Honor. They are, one, relevant to rebut the inference of copying by Mr. Tufenkian, because if other people are out there doing grids of circles, they didn't all copy from Mr. Nicholls. That is probative of the fact that Mr. Tufenkian didn't copy it from Mr. Nicholls either. It is possible to arrive at this design independently. And these designs show that.

THE COURT: All right. But that's something that may come through on Mr. Tufenkian's examination, not Mr. Nicholls'.

Right?

MR. CLARIDA: Well, that's correct, your Honor.

MR. MOSKIN: And I asked Mr. Tufenkian at his deposition -- maybe I'll offer inconsistent testimony now. He identified seven or eight works, all produced by his company, that he said were his sole and exclusive design influences. And I showed him again the other use -- the ones that had been produced at that time in discovery, and he confirmed those had not influenced his design making at all.

MR. CLARIDA: Your Honor, in Mr. Moskin's opening, he promised to the jury, I guarantee you, you will see no other designs that look even remotely like Mr. Nicholls's designs. I want to show the jury he's wrong about that. There are other designs that look like Mr. Nicholls' designs, and they don't come from James Tufenkian.

MR. MOSKIN: When I made that statement I was cognizant of the fact that some of these might come in, and I don't believe any of them are remotely like it. That's a jury issue.

MR. CLARIDA: The jury is entitled to make up its mind as to whether they do or don't look like it.

THE COURT: That might be. But I don't see how you're going to get them in through Mr. Nicholls, on your cross-examination of Mr. Nicholls, unless Mr. Nicholls says that he saw one or more of these designs. If he says he saw one or more of them, you will get them in, through Mr. Nicholls. Otherwise you will have to figure out another way to get them into evidence.

All right. I want to press ahead at this moment. We can discuss this more at 5 o'clock. But let's bring in the jury. Mr. Nicholls, come on up.

DAVID SHAW NICHOLLS, Resumed.

(Jury present)

THE COURT: Members of the jury, at this time we will

continue with Mr. Moskin's direct examination of the plaintiff, Mr. Nicholls.

You may proceed.

DIRECT EXAMINATION (Cont'd)

BY MR. MOSKIN:

Q. Mr. Nicholls, I'd like to show you what have been marked as Plaintiff's Exhibits 20, 21, 22, 23, 24, 25, 26, 28, 30, 31, and 32, and ask if you can please identify these.

A. Exhibit 20 is an invoice from my company to an architect called Mitch Mixon, and it's for a 12 by 15 Hiran rug and a 14 by 18 Prado rug.

Q. If I may, just so the jury -- to move this along --

MR. MOSKIN: If I can offer that into evidence, before you continue.

A. All right. Sorry.

MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 20 is received in evidence.
(Plaintiff's Exhibit 20 received in evidence)
THE COURT: Members of the jury, you can turn to the tab marked 20.
Q. I apologize for interrupting. If you could explain.
A. Well, it's an invoice. It's for a Hiran, standard rug. And a 14 by 18 Prado standard. And the total price for the two carpets is $24,000. And the deposit received was 16,000. The

remaining balance, 8,000. And it's dated 12/23/99.
Q. It's dated 12/23/1999. How much prior to that date, if at all, would the rug, the Prado rug, have to have been created?
A. Well, for a 14 by 18 Prado -- this was, I believe, a 100-knot rug judging by the price -- it would be anywhere from six months to eight months to nine months, minimum of eight months, in fact. That's a very large rug.
Q. So when would that place this?
A. Well, if it's dated 12/23, we can assume that at least it was ordered in the previous March, because this is dated -- this is actually written for to collect the balance. So we could assume the rug has been produced and is now ready to ship.
Q. So it would have been in March 1998.
A. That is correct. March 1998 would have been the manufacturing time of that item.
THE COURT: Hold on one moment. I'm confused. The invoice says December 23, '99.
THE WITNESS: Yes.
THE COURT: I thought I heard you say eight months to produce the rug.
THE WITNESS: About eight months, yes.
THE COURT: Wouldn't that be March of '99, not March of '98?
THE WITNESS: You're correct. I am mistaken. It

would be March of '98. That is correct. Excuse me.
THE COURT: That's all right.
A. Yes. Minimum eight months to make the rug. Yes, indeed. Figuring something like that, March of 1999.
Q. Can you identify Exhibit 21.
A. Exhibit 21 is a printout from our database of inventory and it shows that an 8 by 10 Prado standard rug is in stock. It's identified as rug no. 159172.
THE COURT: Hold on. Instead of reading from documents that are not in evidence, I think the best way --
THE WITNESS: Oh, I'm sorry.
THE COURT: -- to do this is, just tell us in a word or two what the document is. I suspect that Mr. Moskin is then going to offer the document in evidence.

THE WITNESS: OK. Sorry.
THE COURT: There is likely not going to be an objection. And then we can have the jury turn to it and you can tell us what we're looking at.
MR. MOSKIN: That would be terrific. Thank you, your Honor.
THE COURT: Let's all take a breath and see if we can do it that way. So it's a computer printout.
THE WITNESS: It's a computer printout.
MR. MOSKIN: I would like to offer Exhibit 21 in evidence and permit the jury to review it.

MR. CLARIDA: No objection, your Honor.
THE COURT: All right. Plaintiff's Exhibit 21 is received in evidence.
(Plaintiff's Exhibit 21 received in evidence)
THE COURT: And members of the jury, you can turn to 21.
Now, tell us what we're looking at.
THE WITNESS: We're looking at a printout from my database of inventory. And we have in stock an 8 by 10 Tibetan carpet. And the reason I can say it's in stock is because it's been inspected and graded as an A quality. And the date of this inventory is 6/7/2000 order date. Sorry, 6/15/1999. I apologize. It's received, the rug was received at 6/15/1999. And along the information at the bottom, our database calculates the price of the item, which has a net selling price of $7,200 and 80 square feet.
Q. Can you explain the reference in the upper right-hand corner to the Miami showroom?
A. Yes. Well, this means that the rug was actually in our Miami showroom at that time. If the location, if it was at the factory in -- it's manufactured in Kathmandu, it would say the factory that it was at. So it was located in the Miami showroom. And it's graded an A.
Q. Did Mr. Tufenkian sell any rugs in the area of your Miami showroom?

A. Yes, he did. To my knowledge he actually sold rugs to a store across the road, which was -- which I believe was called Carpet Creations. And they were actually 25 feet from my front door. He was a dealer of Tibetan carpets at the same time as this Prado was in the showroom.
Q. Can you identify for us, briefly, Exhibit 22.
A. It's a purchase order.
Q. From your company?
A. Yes. It's a purchase order -- actually, no, it's a purchase order from Jackie Miller Interiors, Incorporated.
Q. To your company.
A. To my company.
MR. MOSKIN: I would like to offer Exhibit 22 in

evidence.

THE COURT: Any objection?

MR. CLARIDA: No objection, your Honor.

THE COURT: All right. Plaintiff's Exhibit 22 is received. Members of the jury, you can turn to tab 22.

(Plaintiff's Exhibit 22 received in evidence)

Q. Now can you tell us what it references.

A. It's a purchase order from Jackie Miller Interiors in Atlanta, Georgia, addressed to my company in the D&D building, and it's an order for a 12 by 16 Prado rug. And the unit price is $17,250. Greg was the salesperson at Nicholls. It's our telephone number below where it says "Greg." And it confirms

receipt of the 50 percent deposit in the amount of $8,625.

And the date -- it's hard for me to see here, but it looks like 1/12/01.

Q. Based on that date, if that's right, do you know when this rug would have been made?

A. Yes. This rug -- well, it's a 12 by 16. It's at least an eight-month lead time.

Q. So that would meant the rug would have been created when?

A. Well, sometimes eight months prior to '01. So 1/1/01 puts us into '00 March or April.

Q. Can you identify for us what's been marked as Exhibit 23.

A. This is an invoice from my company. Our letterhead has been stapled over by the designer's business card.

MR. MOSKIN: I would like to offer Exhibit 23 in evidence.

MR. CLARIDA: No objections.

THE COURT: Plaintiff's Exhibit 23 is received in evidence.

(Plaintiff's Exhibit 23 received in evidence)

Q. Can you tell us what this references.

A. This references a 10 by 14 Prado rug. And this was probably a 60-knot item, because it's $8,750 net. And the date on this invoice is October 14, 1999. And I see that this is a bill for the balance of the payment, because it says "for approval, paid security deposit 10/13/1999." So, and Toby

Revis would have been the salesperson. And there's also a charge here for padding for the rug, because we very often ship the rug with the pad and install it.

Q. Can you tell us when this rug would have been created, first created.

A. This rug, for a 10 by 14, 60-knot, four, five months prior to that date.

Q. Before October 1999.

A. That is correct.

Q. Can you identify for us what's been marked as Exhibit 24.

A. This is a sales proposal from -- to Matt Brosius, from my company.

MR. MOSKIN: I would like to offer Exhibit, Exhibit 24, in evidence.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 24 is received in evidence. And members of the jury, you can turn to the tab.
(Plaintiff's Exhibit 24 received in evidence)
Q. What's the date of this?
A. The date of this is 11/3/2000. And it's for a 14 feet by 18 feet Prado 80-knot rug. I should just say that we make the rug in three qualities: 60 knot, 80 knot, and 100 knot, 60 knot being the least expensive quality and 100 knot being the more expensive quality. And this 14 by 18 Prado cost this architect $22,900.

Q. Can you identify for us what's been marked as Exhibit 25.
A. Exhibit 25 is an inventory -- it's actually a status on orders placed by my company to the factory. And it lists rugs and who the customers were, which is on the client end user on the right.
Q. Dave, before you go on --
A. Oh, I'm sorry.
MR. MOSKIN: We offer Exhibit 25 in evidence.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 25 is received in evidence.
(Plaintiff's Exhibit 25 received in evidence)
A. And it shows that there is a rug number 350161716, Prado Tawny 6 by 9, 80-knot Tibetan showed to Ms. Laurie Tanner. And this is -- these were orders placed on 12/15/00.
Q. How much prior to this date, December 15, 2000, would that rug have been made?
A. Well, it says "orders placed on 12/15/00." I want to be totally frank with you, and I'm not sure when that order would have been placed. I can only say that the rug was in existence at this point, because it goes into inventory after it's -- it gets a tag number after it gets inspected.
Q. Can you identify for us Exhibit 26.
A. Exhibit 26 is a sales proposal for my company for a Prado 100-knot 12 by 16.

MR. MOSKIN: I would like to offer Exhibit 26 in evidence.
MR. CLARIDA: No objection.
Q. And can you explain --
THE COURT: Hold on. What's the basis for the objection?
MR. CLARIDA: I said no objection, your Honor.
THE COURT: Oh, I'm sorry. Forgive me. All right. Plaintiff's Exhibit 26 is received in evidence.
(Plaintiff's Exhibit 26 received in evidence)
Q. And could you explain for us what is shown here.

A. It's a sales proposal, and it's for a standard Prado 100 knot 12 by 16. And it's a request for the balance for this rug. And that balance amount is $8,625. It shows a lead time of 18 to 22 weeks. And that's a 12 by 16 100-knot carpet. So that's about right. Four and a half, five months, four, three, five -- yes, about four and a half to five months, minimum, production time.

THE COURT: Forgive me for a second, but what is the difference between Plaintiff's Exhibit 26, which is a sales proposal, for someone in Chattanooga, Tennessee, and Exhibit 22, which is the purchase order for the same rug? Or did this lady in Tennessee buy two?

THE WITNESS: No -- well, more than likely. It's the same rug. And if I -- the -- this is the purchase order from

her company, and the sales proposal is the invoice from my company.

THE COURT: All right. I just --

THE WITNESS: That's the relationship. It is in fact --

THE COURT: It's not two different sales.

THE WITNESS: I would guess it's the same sale, yes.

Q. Can you identify for us what's been marked as Exhibit 28?

THE WITNESS: But I might be wrong.

A. I'm sorry. 28?

Q. Yes.

A. 28 is an inspection report from one of my suppliers.

MR. MOSKIN: I would like to offer Exhibit 28 in evidence.

MR. CLARIDA: No objection.

THE COURT: Plaintiff's Exhibit 28 is received in evidence.

(Plaintiff's Exhibit 28 received in evidence)

Q. Does this identify any Prado rugs?

A. Yes. This outlines a current production schedule of rugs, and run no. 143 -- sorry -- 140, order no. 125001, references a Prado Ermine, and the carpet number is G9688, size 13 feet 4 inches by 17, 6. That would more than likely mean that that's the finished size of the rug, because we tended to measure the rug after it was complete so we knew exactly what we ended up

with. In other words, that means the rug would be complete. Which means that this rug was complete, with an estimated delivery date of 15/5/00. And the reason it's written 15/5 is because over there the day goes before the month and the year.

Q. So the delivery date was May 15, 2000?

A. That's correct. Which means the rug would have been made a good seven or eight months prior to that.

Q. If you could identify for us what is shown as Exhibit 30.

A. Exhibit 30 is a handwritten document interior to my organization.

Q. This is your sale -- your record, the record of David Sharmacher.
A. Yes, it is. It's a warehouse-prepared inventory statement.
MR. MOSKIN: I would like to offer Exhibit 30 in evidence.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 30 is received. Members of the jury, you can turn to it.
(Plaintiff's Exhibit 30 received in evidence)
Q. Can you identify for us what -- can you explain for us what we're looking at?
A. We're looking at a handwritten document showing the Tibetan rugs that were in stock as of July 25, 1999.
Q. Does it identify any Prados?
A. It identifies two Prado rugs, no. 32 and 33, one of 8 feet

4 inches by 10 foot 6, and one of 8 feet 2 by 10 feet 2, which were currently in inventory as of that date.
Q. The last, those are the last two listed on the page?
A. On page 1, that is correct.
Q. I see where it says "Prado." Underneath it it says "Nile." Is that also a Prado rug?
A. Oh, I'm sorry. That's my error. It's not a Prado rug. No. Nile is a completely different design.
Q. So it's just the one --
A. It's just the one Prado rug, yes.
Q. Now, this series of exhibit, the last, can you identify for us what's been marked as Exhibit 31?
A. It appears to be a new order statement to a factory from my company.
MR. MOSKIN: I would like to offer Exhibit 31 in evidence.
MR. CLARIDA: No objection.
THE COURT: All right. Plaintiff's Exhibit 31 is received in evidence.
(Plaintiff's Exhibit 31 received in evidence)
MR. MOSKIN: I take it the jury may now look at that; is that correct?
THE COURT: Yes. Members of the jury can turn to tab 31.
Q. Does this document reference any Prados in existence as of

its date?
A. Yes. This was a document that would be prepared for the salespeople so they could know very quickly what's available for sale, because this lists unsold goods. And we see at the bottom there is a Prado and there's a 2 by 2 strikeoff sample, a 3 -- one 3 by 12, one 6 by 9, one 8 by 10, one 9 by 12, and -- I'm sorry. Yes, one 9 by 12, and zero 10 by 14s.
Q. Those sizes, are those referenced some other page?
A. Those sizes are different production sizes.

Q. The line across the top of the page, is that where you're reading, referring to?
A. Yes. I'm sorry. The sizes refers to, yes, the actual size of the carpets. The quantity is in a vertical column. And the tick marks, I'm not sure, but they are probably just someone double-checking the inventory to make sure they're there.
Q. So all told, how many Prado rugs does this indicate you have in inventory as of --
A. Well --
Q. Let me finish the question. -- as of February 16, 2000?
A. Two strikeoff samples and then one, two, three, four, four Prado rugs. As of February 16, 2000.
Q. You heard Mr. Clarida say in his opening statement that you had sold about three or four Prado rugs a year, since 1998 or '99? Is that correct?
A. I did hear him say that. And I'm a wee bit embarrassed

about that because it's absolutely -- it's not true. And I spoke out of turn in the deposition, without thinking and without looking at the records. So that was my error in the deposition. We've sold significantly more. After I went back to the office, I looked at the records to see how many we had sold. Unfortunately as the creative guy as well as the so-called businessman, I seem to spend more time in the creative department. But these are accurate invoicing and inventory statements.
Q. Has there been any publicity for the product?
A. The Prado rug, as we mentioned earlier, the first most significant publicity was when it was selected by Philip Johnson's office, the architect in New York, for a redo of the Blanchette Rockefeller townhouse in midtown Manhattan. And in fact the rug was the centerpiece for that design project. And, yes, it was featured in The New York Times, over three pages, one large picture and then some other detail shots for the different arrangements.
Q. I would like to show you what's been marked as Plaintiff's Exhibits 35 and 36 and ask just if you can quickly identify them before we show them to the jury.
A. Yes. This is a capsulation of the article that was featured in The New York Times magazine. This is the Prado rug centerpiece.
Q. Which number are you referring to?

A. I'm sorry. 36.
Q. And what is 35?
A. 35 is the front cover of the magazine, the New York Sunday times, and actual photocopies of the article in its more extended form. And it makes reference to the rug by David Shaw Nicholls.
MR. MOSKIN: I would like to offer Exhibits 35 into evidence.

A. In fact it makes reference to Prado rug by David Shaw Nicholls.

THE COURT: Any objection?

MR. CLARIDA: No objection.

THE COURT: All right. Plaintiff's Exhibits 35 and 36 is received in evidence. Members of the jury, you can turn to those tabs.

(Plaintiff's Exhibits 35 and 36 received in evidence)

A. To answer your question fully, it was also featured in other design magazines at the same time: Interior Design Magazine. And we also advertised the rug in some trade journals, which I have the copies of here also. One of them being the Alt Spec catalogue. And it was featured in an Elle Decor advertising that we did.

Q. Did you make any use of Plaintiff's Exhibit 36, your company?

A. Yes. We made extensive use of this. This is a format we

use. It's a very strong marketing tool for our company. And largely it gets sent to architects and designers throughout the United States and in Europe. And we've printed ten thousand -- I believe we printed about 10,000 of these individual sheets, of which several thousand would be sent out to various design firms, interior design firms and architectural firms all over, as I say, the United States.

Q. Do you know how it was that Mr. Johnson came, Philip Johnson came to select your rug to use in his interior design?

A. Yes. Our rug was actually on show in the D&D building in New York City. That's on 58th Street and Third Avenue. And in fact we had a feature on the Prado rug in the window of the sixth floor, between the showrooms of Holly Hunt and Donghia. And the Prado rug was shown in that window for three months. And this actual picture was featured with the Prado. It's a very strong, very good way of endorsing the look and value of the design.

Q. My question is, how did Philip Johnson come to select the rug in the first place?

A. Oh, because his -- the people from his office came into the D&D building, and he had heard about us and he wanted to see the rugs.

Q. Mr. Nicholls, I'm showing you what's been marked as Exhibits 29, 37, 38, 39, 47, 48, and 49. And I'll ask you quickly to go through those and explain what they are.

A. OK. Do you want to go first?

Q. Why don't you start with Exhibit 29.

A. Exhibit 29 is a picture of an interior --

THE COURT: Why don't we do it this way. Is there going to be any objection to any of these exhibits?

MR. CLARIDA: No, there won't, your Honor.

THE COURT: All right. Plaintiff's Exhibits 29, 37,

38, 39, and 47, are received in evidence.
MR. MOSKIN: 48 and 49 as well?
THE COURT: 48 and 49. Received in evidence.
(Plaintiff's Exhibits 29, 37, 38, 39, 47, 48, and 49 received in evidence)
THE COURT: Members of the jury, as the witness refers to these exhibits, you can turn to those tabs.
MR. MOSKIN: Thank you, your Honor.
THE COURT: So let's start with 29.
A. 29 is a picture of an interior design by an architect called Mitch Mixon, who was listed there later in the billing of my company, and this shows a very large Prado rug. I guess this has to be about 20 feet by 16 feet. It was featured in a full-page article in the Architectural Digest magazine.
Q. If you look at Exhibit 37, can you explain to us what that is.
A. Exhibit 37 is a sheet of similar format as the style, the Philip Johnson article in The New York Times. This is a job

that was featured in Architectural Digest of our flat-weave collection. That was the Hiran rug at the bottom, and this was the forerunner of our flat-weave collection. And basically it was a very extensive article that we compressed into one page.
So we have the Domino design, the Salim design, and the Hiran design.
Q. Can you explain for us what is shown in Exhibit 38.
A. Exhibit 38 is a page from Interior Design Magazine dated October 31, 2000, which features the Prado rug, top left.
Q. And let's skip over 39 for a moment and go to Exhibit 40. Excuse me, Exhibit 47.
A. 47.
Q. Yes.
A. OK.
Q. And what is Exhibit 47?
A. 47 is -- are copies of a trade book that was distributed throughout the United States and Europe, and outside the United States also, and it was called Alt Spec. And in this book, my company advertised two pages of our various designs, and attached here is a page of the Tufenkian company's designs at that time. And in fact he took, as I best recall, two pages, two or three pages. And so the pages of the -- the page which is numbered 215 at the bottom is the Tufenkian ad for his Tibetan carpets that he was currently marketing at that time.
Page 218 and 219 respectfully show my rugs that I was

featuring at that time, and included on page 219 is a portion of one of the Prado designs, which actually is represented on the floor in front of you.
And then last page, 224, shows the current marketing designs of the Tufenkian company.
And I would like to add, I believe there was quite an

extensive circulation of this book. I would believe there was about 10,000 books circulated throughout the United States of America.
Q. Who does that get circulated to, to your knowledge?
A. It was circulated to architectural -- architects, designers, and interior designers, professionals in the field throughout the United States. It was designed as a trade-only publication, and quite well done also.
Q. Can you identify also for us what's been marked as Exhibit 48.
A. 48 is the front cover of Elle Decor magazine, a magazine that we are featured in regularly, editorialized, and that we also advertise in from time to time. And the page attached to the front cover is a page we advertised -- we took out advertisement in, and -- that shows our New York showroom, our Miami showroom, and a picture of the Prado rug, bottom right-hand corner.
Q. And Exhibit 49.
A. I should also probably call attention to what issue this

was. I'm looking for a date, but I don't see one.
Q. Is the date -- is there a delivery date on that?
A. Oh, excuse me, November 2001 is the circulation date.
I just want to point out that that ad was more than likely prepared four months prior to the publication of the magazine. And so not only did we have to have the rugs installed, but we had to have quite a sophisticated format for sending to the magazine to generate the ad in the first place.
Q. Can you identify for us Exhibit 49.
A. Exhibit 49 is another variation of the Prado design in terms of color. That's the Jacob Javitz show in New York City, which we participated in, and it's actually sponsored by Architectural Digest. And we take a very nice, big booth at that show. And for three days it's to the trade, and the fourth day it's open to the general public. Their attendance runs into the, I should say they have about 26, 27 thousand people to visit that trade show from all over the United States, but primarily the northeast corner. And we actually displayed the Prado there in its entirety, a 14 by 18 rug. And we actually sold that rug at that show, I'm pleased to say.
And all these pages show our booth and the various designs we were presenting at the show. And as I say, this was dated October, November 2000.
Q. Without offering into evidence the vast number of amount of publicity that you described early on about yourself, can you

explain what, at least the one that's shown here, Exhibit 39, is.
A. Exhibit 39 is, it's from a design magazine. I think it was product design or -- oh, it's Contract Design, excuse me. It's Contract Design Magazine. And it was an interview they

conducted with me back in 1994. And it's quite a -- it's quite a good eye opener, if you will, to the style of the working of my company and the way we were attempting to come up with a very unique look for our products. And in fact it discusses in some detail the circles and the problems associated with making circular carpet -- circles in carpets and the various tones and dyes and the design techniques which I employed. So this was an interview I gave to that magazine in October 1994. And the circulation of these magazines varies from anywhere from 5,000 to 200,000, in the United States. These are largely trade magazines.
Q. I would like to show you what have been marked as Exhibits 42 and 43.
A. Exhibit 42 is a postcard of a Prado design. And we printed, I understand, 3,000 of these cards. And I think we have about 20 left. And the remainder would have been sent out to architects and designers.
The --
Q. Before you go on --
MR. MOSKIN: If I can, may I offer Exhibit 42 in

evidence.
A. Oh, I'm sorry, I apologize.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 42 is received in evidence. Members of the jury, you can turn to it in your notebooks.
.
(Plaintiff's Exhibit 42 received in evidence)
Q. Can you identify Exhibit 43 for us.
A. Yes. Exhibit 43 is the order for these postcards. And the order was -- well, we ordered 3,000, and the date was on or around June of the year 2000. And I see the Fedex here, air bill, it says May 30, 2000. And so the Fedex document is basically the material for purchasing the cards. And Exhibit 42 is the actual card in question.
Q. When did you begin sending out the card, Exhibit 42?
A. We sent it out immediately we get it.
Q. And so that would have been when?
A. That would have been the middle of the year, around about June 2000.
And as I say, we sent about, I should say, about 20, 2900 of those cards. We've got a few left.
Q. Do you still have in front of you Exhibit 44, which is a big reprint from your Web site? This is already in evidence.
A. 44.

I didn't give it back to you? Oh, yes, I have it, right here.
Q. Is your Web site also a form of publicity for you?
A. Our Web site I would consider to say is the most

informative, useful selling tool that we have.
Q. Why do you say that?
A. Well, because we put a lot of work into it to give the client a clear idea of what the rugs actually look like. And for area rugs in particular, it's an excellent medium, because you can have the opportunity to zoom in on details of the rug, see the texture, the quality, different sizes, colors, location charts. It's a very extensive marketing tool for us. We use it, we basically link up with our client base with our Web site.
Q. If I can, I apologize, I passed over one exhibit, Exhibit 32, and I was wondering if you can identify that for us. I believe you still have it in front of you.
A. Exhibit forty --
Q. 32.
A. -- 32.
Q. A price list.
A. OK, yes. That's a price list of our company, dated January 1999.
Q. I'm sorry. Did you say it's a price list of your company?
A. It's a price list of the products of my company, dated

January 1999.
MR. MOSKIN: I would like to offer that in evidence.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 32 is received in evidence. Members of the jury, you can turn to it in your binders.
(Plaintiff's Exhibit 32 received in evidence)
Q. As of January 1999, did your company list the Prado anywhere on its price list?
A. Yes, we did. We listed it under Indo-Nepalese carding.
Q. Where is that on this page?
A. It's actually -- it's under Tibetan rugs and it's in the fourth corner, fourth corner down. And I believe it's design no. 118, is listed.
Q. Have you ever had any business relationship with the defendant -- defendants -- Tufenkian Import/Export and James Tufenkian?
A. Yes, I have.
Q. Can you explain what was that relationship.
A. In essence, he manufactured Tibetan carpets for my company without any rights of -- any design rights being transferred.
Q. He simply manufactured the rugs --
A. He made the rugs and sold them to my company, that is correct.
Q. You purchased them back from him after they were made?

A. At a premium cost, that is correct.
Q. And when did that relationship begin?
A. The date of the initiation of that relationship must be

about seven or eight years ago, I would think.
Q. Let me offer you Exhibit 50 and see if you can identify that.
A. This is a manufacturing agreement -- oh, yes, I can. Sorry, I can identify this. It's a manufacturing agreement.
Q. Agreement between?
A. Between myself and Tufenkian Import/Export Ventures.
MR. MOSKIN: I would like to offer Exhibit 50 in evidence.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 50 is received in evidence.
(Plaintiff's Exhibit 50 received in evidence)
Q. Does this have a date on it?
A. It has a date of September 20, 1996.
Q. Where do you find that?
A. I find that on page 3, which is the date it was signed by James Tufenkian and myself.
Q. Do you recall when the relationship, the business relationship with Mr. Tufenkian ended?
A. I should say it was probably a few years subsequent to this. I don't recall the exact date.

MR. MOSKIN: Your Honor, to save I little time, I believe we stated in our pretrial order the date the relationship ended, in 2001.
THE WITNESS: That's about right, yes. 2000, yes.
THE COURT: So members of the jury, counsel stipulate that the relationship ended at a certain time. You can accept that as a fact.
A. Is that September of 2000?
Q. April 2000.
A. April 2000.
Q. Can you describe, without going into great detail, how the relationship ended.
A. It ended in a lawsuit. And it ended as basically James Tufenkian retaining ownership of inventory of my designs. And we had some pricing issues and billing issues. And we ended up on a very adversarial basis, to put it mildly. It was not a happy ending.
Q. Have you had any business dealings with Mr. Tufenkian since April 2000?
A. No.
Q. In the years of your relationship, business relationship with Mr. Tufenkian, were you aware that he was making or selling any rugs that looked anything like your Prado design?
A. I was aware he was making no rugs that would look like my Prado design.

Q. How did you know that?
A. Well, I'm -- I consider myself pretty knowledgeable in the

field, in fact very knowledgeable, I would say. And I was certainly familiar with Mr. Tufenkian's production at that time, bearing in mind one of the interesting factors of our working together was the fact I would do rugs that wouldn't compete with his program, because he had quite a healthy production of traditional designs. In fact, I think he would admit to the fact that was the backbone of his business, the recoloring of traditional oriental patterns.
Q. When you say traditional, can you explain what you mean?
A. Well, these are designs based upon old designs, I would call them, traditional designs of Persian and Chinese origin, Iranian origin, and what many manufacturers do is, they take these established old designs, and they recolor them and retune them, and basically make them new, make them afresh. That, I don't -- and I certainly don't mean to talk for his company, but at that time the impression I got from his business was that the backbone of his business was his antique-looking rugs, if you will, although he -- and then he did have an offshoot of that where he produced nontraditional designs, where he hired designers to do that.
It was quite an important part of our relationship, in fact it was a very important part, that the designs that I would be developing would bear no resemblance to his

whatsoever. That would clearly have been a conflict of us doing any business together. And so when I was developing my designs and having him make them, it was on the understanding that there would be nothing like it in his portfolio. And so I -- and part of the relationship depended upon me handing him my designs, my design work, and my colors.
Q. Other than Mr. Tufenkian and the design world at large, are you aware of anyone else that makes, that has made any rugs in any way, or other designs, in any way resembling your Prado design?
A. No.
Q. Did you in creating the Prado design, as you testified to earlier, refer to any designs of parties other than yourself?
A. None. And as a rule in my company we don't do that. I've said it and I'll say it again. It's a very, very critical component of any success of my company. When you charge a fortune for a carpet, it has to have something unique and special about it. Who is going to spend $20,000 on a rug if some guy down the road is going to make it for 14 and make 300 of them, by changing it slightly?
Q. Can you tell us what you considered to be original about your Prado design.
A. Some people think that the design process of a simple item is effortless, but it's actually more difficult to design something that's very simple in appearance than it is to design

something that's extremely complicated. It challenges the designer very much, because of course you have to try to embody very subtle themes, underlying the surface. To simply come up with a graphic and call it successful and try to market it at the high end of the market, it wouldn't hold any substance. And the one common denominator to all of our productions was, we sold very expensive products. That was just the way it was.

So in order to do that, we had to come up with designs which were unique. The Prado design, for my company, is currently a design which in fact is a synthesis of many works we've done, but it's completely new and completely original to my company. The way the ellipses form and the way the circles come together, it's a key component in a profound design sense, but let me tell you in simple English, if someone lifts an Elle Decor magazine and sees a picture of the Prado rug and they make an association with my firm, they say, that's a David Shaw Nicholls Prado. And we, we depend on that instant understanding in order to be in business.

So if someone comes along and manages to plagiarize or copy our image, we lose very quickly, because the authenticity and the originality of the appearance of the rug is very important. Never mind the fact that there's a very clever and careful scaling process that goes on, and balance.

My background is architecture. And people will say, and if you read the article that was done in the interview, my

experience as an architect was such that scaling and proportion were very important. Because to give any volume credence to contemporary rugs, it's a very big challenge. So the scaling, the proportion, and the coming together of the elements has to either be done with tremendous sense of skill and proportion, or in fact it just doesn't work. It just falls flat.

The Prado rug, I'll give you some other examples, most oriental rugs have between 10 and 30 colors in them. Most of my rugs have between 4 and 6. The variation of the colors in a Tibetan rug are created by what we call an abrash, and I'm sure that Mr. Tufenkian's company will continue to belabor that point. But it is a very, very beautiful component. But it doesn't conflict the fact that the shapes themselves and the overall design has to be carefully tuned to work.

The idea of the Prado looking the way it does is extremely important in its simpler sense, not in a complicated sense, in the simpler sense. But it just so happens the creative process to produce a simple design that has volume is very difficult.

So all the elements that you see in the Prado design that may or may not 100 percent be reflected in the Eclipse series of designs produced by Tufenkian, do understand that the look of the Prado, as I hope you will see yourselves from the images you're going to see, is unique. And understand that in my business, the uniqueness is very important. Or I'm out of

business, immediately.
Q. You testified a moment ago that while you were working with Mr. Tufenkian, you were not aware that he sold anything like the Prado.
A. That's correct.
Q. Did there come a time when that changed, when you learned something different?
A. Well, the way I -- the way it changed is when I got a delivery of an Elle Decor magazine and I saw the Eclipse rug, or the Total Eclipse. I'm not sure.
Q. Let me show you Exhibit' and ask you if that is the Elle Decor magazine you were referring to.
A. This is the magazine, which ironically is the same magazine that we advertise in too. So Elle Decor, David Shaw Nicholls, Prado; Elle Decor, the launch of the Tufenkian Eclipse.
MR. MOSKIN: I would like to offer in evidence Exhibit 52.
THE COURT: Any objection?
MR. CLARIDA: No objection.
A. So I -- this is when --
THE COURT: Hold on.
THE WITNESS: Sorry.
THE COURT: Plaintiff's Exhibit 52 is received in evidence. Members of the jury, you can turn to the tab.
(Plaintiff's Exhibit 52 received in evidence)

Q. Can you tell me what -- this, Exhibit 52, it seems to be addressed to you. Is that right, the cover?
A. Yes, it does, that's correct.
Q. How did you receive this?
A. In the mail.
Q. Do you subscribe to Elle Decor?
A. I subscribe to the magazine, that's correct.
Q. Did your opinion, after reviewing this magazine when it came in the mail, did your opinion --
A. Well, I --
Q. Let me finish the question.
A. Sorry.
Q. -- opinion that Mr. Tufenkian or Tufenkian Import/Export was not selling anything similar to the Prado, did that change?
A. Well, it changed when I saw this magazine, and I was flabbergasted.
Q. What about it caused you to be flabbergasted?
A. The instant look of the rug, and I thought, that's my Prado. And not only me, I'm pleased to say. A lot of other people thought it was and a lot of other people, I'm not pleased to say, thought it looked like the Prado.
MR. CLARIDA: Objection.
A. And -- so...
THE COURT: Pardon me?
A. So I first saw it in the magazine that was delivered and I

was flabbergasted.
Q. What about this made you think it was similar to the Prado?
A. Well, there were certain design decisions made in the creation of this rug that were extremely similar to the look of the Prado. More than mere coincidence.
Q. What --
A. There's nothing else like this on the market that looks like this.
Q. Can you identify what about it made you think that?
A. Well, the way the circles are dissected, the way the shapes are laid out, the spacing and the proportion of the circles, the fact that it is a rug which features circular motifs of a certain boldness, a certain directness. In fact, if you take my Prado rug and you sit it down on that flat floor and you cut off the ends of it, believe me it would be almost like a 100 percent match.
Now, we can get carried away with dissections and fractions of dissections and everything else, but our clients, my clients, looking at this, are saying, what did you do, sell the design to Tufenkian again?
Q. Did anybody actually say that to you?
A. Yes. And in fact it went to the showroom, and they called me up.
Q. Who was that?
A. And he said, I didn't know you gave the Prado design to

Tufenkian. I said, I didn't. He said, well, it doesn't look as good as yours because it's all messed up a bit, but it looks just like it. Who said that? Architects.
Q. You say --
A. Well, John Beckman was one architect that said this. But I obviously have my store. I have -- I don't have a huge dealer network. But we have one in San Francisco. He called me up and he said the same thing.
MR. CLARIDA: Your Honor, is this hearsay testimony?
THE COURT: Sustained.
A. In San Francisco.
THE COURT: Hold on. Members of the jury, this is hearsay. You are not to consider it, what somebody else said out of court. It's only what's said in court that's evidence in this case.
Q. What did you do in response to seeing this Total Eclipse design in the Elle Decor magazine, Exhibit 52?
A. I wrote a letter to his stores, and to him. Actually, the letter was addressed to James Tufenkian, and I cc'd it to his stores.
Q. Did you subsequently come to find that he was also selling a product called Eclipse?
A. Yes. I subsequently did. I went on his Web site. And at that time he had the Eclipse and the Total Eclipse. But for some reason it's disappeared from his Web site now. I think

there's only one there now. But at one time there was an Eclipse and a Total Eclipse on his Web site.
Q. I would like to show you what's been marked as Exhibit 54 and ask if you can identify that.
A. Well, this is the Eclipse rug, which I understand is his first forerunner, where he has these rectangular pieces superimposed over the design.
MR. MOSKIN: I would like to offer Exhibit 54 in evidence.
MR. CLARIDA: No objection.
THE COURT: Plaintiff's Exhibit 54 is received in evidence.
(Plaintiff's Exhibit 54 received in evidence)
THE COURT: And members of the jury, you can turn in your binders to tab 54.
Q. Do you believe any of these resemble your Prado design?
A. Yes.
Q. Can you tell me which ones and why?
A. Well, I think all of these resemble the Prado design in that they show a boldness of the circular motif and a certain scaling proportion and relationship to one another. In no uncertain terms, this rug says, I'm a rug with round motifs with certain intersections. And the depth and the beauty is created by the way the circles are broken up.
I will say the one thing I find a bit clumsy about

these designs are the rectangular overlays, because they tend to make the design clumsy and confusing. But the similarities are the very careful choice of tones that highlight the circles and what one might call a background or a foreground. But the play that carefully defines in no uncertain terms, this is an area rug that says, we have circular motifs, there's relationships between those circles, we have shaded areas that show there's a sincere intelligence to this design, it shows a distinct relationship. This isn't casual work. Don't let you try and convince me this is casual. It's not. Absolutely intentional, Mr. Clarida. There's nothing accidental about the design process.
THE COURT: Mr. Nicholls --
THE WITNESS: I'm sorry.
THE COURT: -- you are not to direct comments --
THE WITNESS: Sorry, I apologize.
THE COURT: -- to defense counsel. All right?
THE WITNESS: I'm sorry. I apologize to the Court.
THE COURT: It's not proper. I won't allow it.
THE WITNESS: Sorry. I apologize to Mr. Clarida.
Q. Mr. Nicholls, can you identify what's been marked as Plaintiff's Exhibit 56.
A. Yes. This is a picture of the Total Eclipse design, as being manufactured by Tufenkian.

Q. Where did you first see these?

A. Well, I first saw the Total Eclipse design in the magazine, as we've seen. And I believe I saw the rest of these on the Web site subsequent to that. Some of them are more of them.
Q. And do you believe these are similar to your Prado design?
A. Yes, I do. And I would venture as far as to say there's a greater clear similarity in the absence of the overlays.
Q. Which overlays?
A. Well, in the Eclipse design, I was the first production --
Q. Exhibit 54?
A. Exhibit 54. -- there is a clear intent to try to create almost vertical intersections on the circles, to break up, if you will, the specific composition of the circles. And then with the Eclipse design, there is an asserted effort to take out, to omit those elements and make it less confusing to the eye, and much more straightforward, much more elementary, so much so that the circular motifs are restricted, dare I say, to a horizontal direction rather than this going in different directions.
Also, there is a symmetry to this design. In other words, from left to right, there are no vertical breaks whatsoever. It runs clear left to right.
So I see this as a synthesis basically of the design. And I think that is close, closer, to the Prado design, simply by virtue of its lack of rectangular elements that were superimposed.

Q. Do you know, from personal knowledge, whether Mr. Tufenkian or anyone at his company directly copied your Prado design in creating either the Eclipse or the Total Eclipse?
A. I have no direct knowledge of that situation. I will only repeat that I sent out my letter, and my postcards, I think, to many carpet dealers in the United States, as well as the architects and designers. And our Web site is obviously totally accessible. But I have no specific knowledge of his accessibility.
Q. Do you know of any other way that Mr. Tufenkian would have had access to either seeing or having described to him the contents of your Prado design?
A. Well, his distribution dealer network is quite extensive, and I would be very surprised if, in his extensive marketing, that he doesn't get feedback from his dealers about what's out there and what's popular, what's in demand. And I will say at that point we did have a very active marketing situation. So I would be surprised if he didn't get some sort of knowledge about what is good -- what designs are going on.
And we run a public face as a company. People used to say to me, Why do you put your designs on the Internet? You're only advertising them to be copied. Well, if you don't show them, you don't get them out there. And so it's a decision you

just have to take. But it's a very public domain, the Internet.

Q. How about the New York Times article? Do you think that may have had any effect?

A. Well, I'm not sure what the circulation of the Sunday New York Times is. But I should say it's in wide circulation. And it was an extensive article. So, again, it's an opportunity that the design would be reviewed, yes. And of course with the trade shows we did and the editorial press that we got featured.

I should say we probably sent out about 20,000 documents featuring the Prado design, physically, between postcards and -- oh, and the poster as well, which we've forgotten to mention. We printed 20,000 posters including the Prado design in them.

Q. How about when you worked -- your relationship with Mr. Tufenkian and Tufenkian Import/Export ended when? I think we already established that, April 2000. Do you recall whether you showed it to him or he had any opportunity to have seen it at the time you were working together?

A. I only know that at the time we were working together there were designs passed back and forth that were being developed. And designs were discussed and passed back and forth. I have no specific recollection of a discussion centering on the Prado design. But there certainly were designs passed back and forth.

MR. MOSKIN: I have no further questions for

Mr. Nicholls.

THE COURT: All right. Members of the jury, it's nearly 5 o'clock. We're going to recess now until tomorrow morning. I see no reason for defense counsel to start his cross-examination for two or three minutes, only to have to sit down.

So I want you to keep an open mind, members of the jury. Come to no conclusions about this case. Don't discuss this case among yourselves or with anyone else overnight. I can only imagine that when you go home tonight, inquiring minds at home are going to want to know what you've been doing all day. And when you tell them that you've been impaneled as jurors in a case in the Southern District of New York, they're all going to want to know the details. And inquiring minds always have opinions, about everything.

The fact of the matter is that you folks took an oath not to have any opinion about this matter until such time as all the evidence is in, you've heard the closing arguments of counsel, my instructions on the law, and you've retired to the jury room to begin your deliberations. So there is no good that can come from any discussions at home. You'll have plenty of time to talk about this case after it's over. Please don't discuss it at home.

Now, we want to start tomorrow morning at 9:30. If you are all here before 9:30, we will start before 9:30.

Refreshments will be waiting for you in the jury room tomorrow morning. The jury room will be open before 9 o'clock for anyone who arrives early. They may wind up with the cinnamon raisin bagel. I don't know. But there are incentives for you to get here early. Whether you get here early or not, make sure that you're here and ready to go at 9:30, because we will all be ready to go. And tomorrow is likely going to be a full day here. And maybe, any of you who felt a little chilly today should bring a sweater. All right.

Have a great evening and a safe trip home. Please recess the jury.

(The jury left the courtroom)

THE COURT: All right, Mr. Nicholls, you can step down, sir.

(Witness excused)

THE COURT: What I would like to do is take a five-minute break. Then we will address some issues together, including the proposed charge. All right. See you in five minutes.

(Recess)

(Jury not present)

THE COURT: First, I have a draft charge that I am going to circulate to you now. My law clerk will distribute copies. And I will go over the changes in it with you in a moment. But I want to make a couple of observations about the

conduct of this trial up to the present time, so that you will be guided tomorrow.

First of all, when counsel and the parties are seated in the well of the courtroom, they are not to react to anything that is said from the witness stand or the podium. During Mr. Clarida's opening statement, the plaintiff and his counsel were visibly reacting to Mr. Clarida's statements that there were no damages in this case. There are other instances where the defendant reacted to something that the plaintiff said from the stand. That has got to stop.

Second, I told you before we started the trial that one of my pet peeves is that any lawyer who has an objection is to stand up. Mr. Clarida, you have not stood up once. And maybe if you had stood up and objected, the jury wouldn't have listened to all that hearsay, which was pure hearsay by the plaintiff about what other people told him about what they saw in San Francisco and other places.

I'm going to tell you right now that if you don't start standing and objecting, if you mutter the word "object" from the counsel table in some low breath, I'm going to direct the court reporter to strike it from the record, for your failure to follow simple rules that will make this trial go much easier, because by your failure to object, the plaintiff and his counsel were obviously emboldened to just go on a grand voyage of hearsay for a page and a half. I was wondering when

the defendant was going to object.

Now, lastly, you folks told me, as recently as last Friday, that this case was going to be tried in one day or two. But you were actually, Mr. Moskin, shading it toward one day of testimony, and before the trial started, you informed my clerk that you expected the direct of Mr. Nicholls to be about an hour and a half.

Well, Mr. Nicholls was on all afternoon. Even at the recess when I asked you how long you were going to be, how much more you had with Mr. Nicholls, you said approximately 45 minutes. An hour and 20 minutes later, you concluded your examination. If that's the pace that is being set, we are going to have enormous problems in this case. I have a Markman hearing scheduled in this courtroom for Wednesday morning. I anticipated that the jury was going to be deliberating at that time. Lawyers from some of the largest firms in the United States want to come in here and set up all kinds of equipment for this Markman hearing. That's problem number one.

Problem number two is, I told the jury that this case is likely to be in their capable hands tomorrow or Wednesday morning at the outside. Some of them have expressed concern about Rosh Hashanah, which comes up later this week, as you well know.

Finally, if we don't finish this case on the appropriate schedule, there is going to be quite a gap, because

we have a number of observant people on the jury who are going to want to be home for Rosh Hashanah, which will truncate the time, and I am going to be out of the district next week from Monday through Wednesday on court business.

So I don't know if that will spur you all to be thinking about what you're doing. I'm trying to do everything I can to streamline the proceedings so that we won't have any delays in your presentation of proof.

Now, let me review with you the proposed charge. I guess before I do, one more comment on the Tufenkian motion or application with respect to these exhibits from third parties. I don't see how you're going to get them in through Mr. Tufenkian if he says, as he testified a short time ago, that he has never seen -- that is, Mr. Nicholls -- has never seen anything that even resembles his design. That was his testimony. The fact of the matter is that those other exhibits are certainly relevant if you can get them in. I don't know how you get them in. That's up to you. But when a witness says that there is nothing out there, I read all the magazines, I see all the literature that's in the marketplace, and there is nothing out there like what I've done, the defendant should be able to come back and show that maybe there is something out there. But how you get these third-party materials in is something that I will have to wait to see.

Now, on the proposed jury charge, I've gone through.

You got the revised charge. But let me tell you what I did. First of all, on page 39, the paragraph that begins "the burden of proof lies with the plaintiff," the plaintiffs propose that the elements allegedly copied by defendants from the Prado design were not original to Mr. Nicholls and the defendants sought the language "were not original to the Prado." My view is that this case is about Prado and not about elements that Mr. Nicholls borrowed from earlier works of his own. And so the language that -- I have adopted the defendants' request there, at page 39.

Now, at page 40, with respect to originality, I have reviewed the submissions. I decline to give the defendants' proposal on originality in the first paragraph where the defendants proposed to add "where an author's work resembles numerous other works on the market" and goes on from there. I am declining to give that, because I don't think that that accurately represents the law.

However, in the final paragraph, I have made some modifications to that portion of the language proposed by the defendant. I have depersonalized it. So instead of referring to Mr. Nicholls' decision in this case, I think an accurate statement of the law is to say, "Furthermore, an author's decision to embody the design in a medium, such as a carpet, rather than some other medium of expression, does not make the design original. It is the design element itself which must be

original."

At page 41 of the proposed charge that you submitted, I have adopted defendants' proposed addition in the first paragraph on the grounds that the copyright protection only extends to new elements, and so borrowing from earlier designs is not what's protected here. So "if you find that Mr. Nicholls' Prado involves variations that he copied from preexisting works, including his own prior works or works of others or works in the public domain, then copyright protection extends only to the elements of Mr. Nicholls' Prado that are original to the Prado design or to the uniqueness of the combination of preexisting and/or original elements that are incorporated in the Prado design."

Then continuing, in the next paragraph I've adopted the defendants' proposed language there as well for the same reason: "Where an author's work is copied from previous work, including his own prior works, there is no precise rule as to how much must have originated from the author him or herself." No, "There is no precise rule as to how much must have originated in the registered work, in order for the author to claim copyright protection."

Yes. Let me read that again. "When an author's work is copied from previous works, including his own prior work, there is no precise rule as to how much must have originated in the registered work in order for the author to claim copyright

protection."

Then, at page 42, copying, essential elements, here again, I am adopting the defendants' proposal to add the language "or from his own prior work." In the paragraph that begins "that defendant copied or took only those portions of Mr. Nicholls' work, if any, which were not original with the Prado design -- that is, portions which Mr. Nicholls had in turn copied or taken from somebody else or from his own prior work -- then the defendants are not liable for copyright infringement of the Prado design."

Then, on the subject of similarity, page 45, I decline to give the charge proposed by the defendant, namely, that "if the Nicholls and Tufenkian works are similar not only to each other but to a number of other works on the market, that similarity would be relatively unlikely to support an inference that Tufenkian copied from Mr. Nicholls."

And turning to page 47, the defendants proposed an additional charge. I think that the charge as proposed by the defendant is too strong. But I agree with the defendant that the thought behind it is one that is appropriate. And so I have modified the defendants' proposed charge to say, "If there is copying of more than a de minimis amount of protected expression from the Prado design, you must determine the similarity between the Tufenkian designs and the Prado with respect to the copied expression. You must ask whether the two

works look alike so that a discerning observer would overlook the differences and regard the works as the same. Where the amount of plaintiff's originality is slight, infringement is established only by very close copying."

Now, does anyone have any comment on that charge in particular? I guess we can work backwards from there.

Obviously, I have stricken the punitive damages claim.

Does anyone wish to be heard?

MR. MOSKIN: Yes, your Honor.

THE COURT: All right.

MR. MOSKIN: It may be that this is a -- I have a concern about this final charge, but it may be, the final charge that we're looking at on page 47, and it may be because you have adopted this charge because of reasons that related to the earlier charges as well, so maybe I will, if it makes sense, I perhaps will refer to make a broader statement.

THE COURT: Go ahead. That's fine.

MR. MOSKIN: I would like to refer to your Honor's own decision in Tufenkian Import/Export v. Einstein Moomjy.

THE COURT: A different case than this case.

MR. MOSKIN: Clearly. And, in fact, in very important respects. In that case, Mr. Tufenkian acknowledged, and there was no dispute, that his work, in which he claimed originality, was derived from public-domain works, which he reorganized and modified in some slight ways. In that case, it was

appropriate, I believe, to apply a discerning-observer test, where, it seems to me, it begs the question here. And the way in which it may ultimately beg the question here relates to your Honor's earlier determination as to some of the earlier charges, that originality can be undermined by the plaintiff's own prior works.

The position we have taken in the case, I believe, is the correct position, is that, included in the brief we submitted this morning, there is no authority that would apply essentially a patent law standard of novelty to the copyright context. The defendants have cited one case in which there was -- in addressing an issue of jurisdiction, the court focused on whether the plaintiff had properly identified a prior work in registering what was determined by the court not even to be a derivative work. That case did not hold that the plaintiff's own -- the copyright owner's own prior original designs could be determined to establish the lack of originality of a later design. I am not aware that plaintiff has cited any case to that effect in the patent law. Of course of plaintiff's own invention or an inventor's own prior invention can invalidate a later invention. It can deprive it of novelty. But originality means it's original to the plaintiff. And again, I think there is just an absence of authority that plaintiff has cited, and I'm not aware of any, that would support a conclusion that originality, which is a

very simple concept -- it means nothing more than the plaintiff didn't copy it from someone else -- to say that the plaintiff is copying from himself is to turn that whole notion on its end.

THE COURT: But he is not, the plaintiff is not suing for copyright infringement of the earlier designs.

MR. MOSKIN: Correct.

THE COURT: He is suing for copyright infringement on the Prado design.

MR. MOSKIN: Yes. I don't know in what respects plaintiff means to show -- or, excuse me -- defendant, defendants intend to show that his prior works somehow make unoriginal the Prado design. There are substantial differences between and among them. But it seems to me they are not forbidden from making -- showing that some design elements were in the public domain or were created by someone else. It needn't follow that simply -- these were -- for example, some of these designs showed a series of circles on a grid in a certain proportion. If Mr. Nicholls was the first in the carpet world or in the design world, as far as this record will show, to have arranged circles, as one design element among others -- and none of these consists solely of circles on a grid -- but if he was the first to do that, then that in itself doesn't make unoriginal the use of the -- of a similar design motif in the Prado design. It is still original to him. He is

the originator of it. That is, I think, the very definition or meaning of originality in the copyright law, as distinct from the patent law.

And we began this morning by saying the Copyright Act is delimited by the four corners of the statute. If you care to look at the patent statute, that, in section -- that expressly provides that an inventor's own prior inventions can invalidate a new invention, if they have been published -- if they are more than a year before the filing of the patent application. There is no similar analogue, or anything remotely resembling in the Copyright Act. And frankly, I would defer to Mr. Clarida if he can cite any case that has ever said explicitly that what is original to an author becomes unoriginal simply because he uses that same motif in a later work. We could for example, and a way to work around this, we could say, we could offer in evidence all of his registrations for these earlier designs. And almost every one of them is registered. Those are still original. Your Honor's decision would in effect put those in a sort of nether world of being, for purposes of this lawsuit, in the public domain. We are not claiming that this is a derivative work based on the Portico or the Ravenna or the Maui. There are substantial differences from that. And in the Well-Made Toys v. Gotha case, the court explains that, "What does it mean for something to be a derivative work? It has to be so close that, were it not for

authorization, it would be an infringement."

None of those works are, I submit, so close to the Prado design to be an infringement. And, again, I believe this instruction works to the great disadvantage of Mr. Nicholls in effect as a matter of law ruling that what he may have created is no longer his creation. If plaintiff can show it was not his creation, of course they are free to do that. But they, I don't believe they will be able to do that in this case.

THE COURT: If Tufenkian said that he copied from the prior works, then that would be OK?

MR. MOSKIN: No. We would sue him for infringement of those prior works. But he doesn't contend, nor on the face of it is there any reason to believe, that the accused Eclipse and Total Eclipse designs were copied from, for example, the Maui or Ravenna or Portico. There is not, I don't, in my own assessment, there is not substantial similarity between the

Eclipse and the Maui, Ravenna, Portico, and so on. In an appropriate case, if it seemed, if we had had a good-faith basis to allege that, we could have alleged that. The fact that we didn't allege that, with Rule 11 perhaps being the outward delimiting constraint -- I don't believe we had a good-faith basis to allege it -- that doesn't, I believe that shouldn't deprive of protectable status or originality design motifs that are indeed original to Mr. Nicholls. And, again, I don't believe there is any authority. And I note the jury

instructions on those specific points don't refer to any case law. And defendants in their briefing on the subject have not referred to any case law that would support such a conclusion, which is really a patent law concept, not a copyright concept.

THE COURT: Mr. Clarida, what do you have to say?

MR. CLARIDA: Well, your Honor, this is fundamentally a copyright question. It is not about patent law at all. And it's about the fundamental copyright principle that the registration of copyright in a work pertains only to the new matter in that work. And just as in Tufenkian I, whether the original matter is public domain material, whether it comes from a third party, whether it comes from the plaintiff's own work, a later work incorporating copyrightable expression from the earlier work does not extend the copyright in that earlier work. And that's exactly what Mr. Nicholls is arguing here, is that he can cover his entire life's work with one copyright registration. And that's simply not provided for in the copyright statute. The result that we have asked for here and that your Honor has incorporated in the jury charge is exactly the same as Judge Buchwald found in the IMS case, namely, if you don't mention a Spec 6A, your registration doesn't cover it. Mr. Nicholls had a chance to declare all his earlier works in Spec 6A. He didn't do that. So whatever is original in those works and carried over to the Prado is not covered by the Prado registration. Otherwise every registration would just

keep getting more and more powerful as you incorporate more and more works into it. And there is simply no basis in the copyright law for finding that.

And the point that we're trying to make here, your Honor, and that I think is now correctly reflected in jury instructions, is that Mr. Nicholls here is arguing, Mr. Moskin is arguing, that Prado is not a derivative work. And we have to ask why is it not a derivative work of the Ravenna or the Portico or the Salim or the Bridgehampton? Why is it not a derivative work? Because all it's done is some circles and squares in a grid with some horizontal color shading. And if it's not enough to make the Prado an infringement of those earlier works, it's not enough to make the Eclipse an infringement of the Prado.

So I think your Honor is exactly right in making the decision significance and instructing the jury in this way. Because this is exactly the point of the third-party evidence as well. This is not original to the Prado. And a suit for copyright infringement of the Prado design is not an appropriate forum for saying, oh, but you're taking elements that originated in some earlier design.

A copyright doesn't extend to Mr. Nicholls. It extends to a work. That's the argument that I made in my brief. And that's exactly what the IMS case is about.

Also, in the IMS case, it's interesting -- and I was

one of the litigants in that case, and I am still stinging from that case. I remember it very well. The two works at issue were both works by the same party. It was one version of a database and then a year later there was an update of the database. Only the second one was registered. And Judge Buchwald held, correctly I think, that only the new material in that second work was covered. And therefore, your Honor, I think the charge as you have drafted it is correct on those points.

MR. MOSKIN: Again, I don't believe there is any case law to support Mr. Clarida's position. I would like to address the IMS case. But, first, the specific substantive point we are addressing here was directly decided by the Second Circuit, not by a parallel Southern District court, which would not be binding on your Honor. But in the Streetwise v. Van Dam case, the Second Circuit said, "On the contrary, because Streetwise is the owner of the copyright of both the derivative and preexisting work, a registration certificate relating to the derivative work in this circumstance will suffice to permit it to maintain an action for infringement based on defendants' infringement of the preexisting work." So the registration -- and that's directly from the Second Circuit, in exactly the same way. Mr. Nicholls' registration of the Prado design gives him -- incorporates every right that he would have had even if those earlier works were the source of -- this would be a

derivative work based on that. You don't have to look any further than Streetwise v. Van Dam.

In IMS, the question was --

THE COURT: But didn't Streetwise involve a derivative work?

MR. MOSKIN: It did.

THE COURT: There is no claim here of a derivative work, is there?

MR. MOSKIN: Well, that's what Mr. Clarida is saying. You should find that the Prado -- this is his whole argument, I believe. The Prado should be considered a derivative work based on all these earlier designs of Mr. Nicholls. And if you accept his own premise, then under Streetwise you have to conclude that the registration certificate for the Prado covers everything in the Prado, including earlier works from which it was derived. What was at issue in the IMS case was something very different. The court said that the 2002 -- whatever the facts may have been I don't know. Mr. Clarida knows. But what motivated the judge to write the decision, what he expressed in the decision, was that between 2002 and 2003, this underlying database that was published on the Internet had changed, so much so that it was no longer the same work. The plaintiff only had a registration for the 2003 work. The Court had an opportunity to review the subject matter in detail and found the 2003 work was not the same as the 2002 work. It didn't

cover what was copied in 2002.

And the critical difference between these two cases is, our allegation is that Mr. Tufenkian copied the product and nothing else. In the IMS case, the plaintiff charged that the defendant copied a 2002 work, for which it didn't own a registration, and the 2003 work for which it did was different. So substantively, the Court could not find that it was the same work.

On those facts, as the Court explained it, that makes perfect sense. Just the same way, if Mr. Nicholls was to claim that the Ravenna design was copied by Eclipse or Total Eclipse but he didn't have a registration for the Ravenna, he couldn't then come in with a registration for the Prado -- assuming that things are rather different because if the Prado would look so different -- and sue on that, saying it was a derivative work. You would have to show that the registered -- it's a jurisdictional question under the statute to show that it's the work that was copied.

But as far as capturing the prior design elements, Streetwise resolved that conclusively, I believe, in the language I just quoted, that because Streetwise is the owner of the copyright of both the derivative and the preexisting work, the registration certificate relating to the derivative work in this circumstance will suffice to permit it to maintain an action for infringement, based on defendant's copying of the

preexisting work.

So even if they did copy from the Ravenna or Portico or whatever it may be, and even if you did conclude that the Prado was a derivative work, under Streetwise, the registration for the certificate for the Prado captures everything that was derived from those prior works. And Mr. Nicholls' own original contributions to his own earlier works does not in any way limit or undermine the originality of the Prado.

MR. CLARIDA: Well, your Honor, if I may just address the Streetwise point briefly. In Streetwise there was a disclosure in Space 6A of the preexisting material. And that's exactly the distinction that IMS makes. It says, this is not like Streetwise where there is a disclosure in Space 6A, where

you don't disclose you don't cover.
THE COURT: I'm going to go back tonight and I'm going to read these cases again. All right. I take it that the point that you have addressed, Mr. Moskin, earlier, is addressed to all of the things that I have done with the charge. Is that correct?
MR. MOSKIN: Well, it would be -- the changes, I think, were on pages 42 -- 41, 42, and -- that may have been -- those were, I think, the only two places where your instructions would permit an inference that Mr. Nicholls' own prior original designs might limit his rights in his later original designs. And to the extent it bears on the last

instruction we were discussing on page 47, my point would be that, unless there is some evidence that these design elements we're claiming are original were -- that copyright in them is weak -- and I don't think there is any basis for that, because Mr. Nicholls' testimony is that this was all original to him. He didn't -- look, obviously no one would say he owns the circle, just as a composer composing a symphony doesn't own the individual notes. But the overall design, we contend, was wholly original to him. He wasn't looking at any outside influences. And so with that in mind, an ordinary observer test is, I believe, the appropriate test, not a discerning observer test.
So that's how those two interrelate.
THE COURT: All right. I'll take a look at it overnight.
Is there anything else with respect to the charge?
MR. CLARIDA: Just one, your Honor. The two proposed additions that the defendant made cited to the Mattell v. Goldberger case about the presence of third-party material as rebutting an inference of copying, I'm just -- I'm not clear what the Court's rationale for disagreeing with that statement of law is. These are quotations from the Mattell Goldberger case. That was the charge on -- the proposed charge at page 40 and 45. I believe the pagination is the same in the actual charge.

THE COURT: My reason behind that is that in the Second Circuit a work only need be independently created and have some creativity. The level of creativity needed is really quite low. So that's why I didn't think that your proposal on page 40, citing the Mattell case, was proper. But I will go back and take a look at that again tonight.
Anything else?
MR. MOSKIN: Nothing, your Honor.
MR. CLARIDA: One other. This is not about the charge, your Honor. Is this time to address other matters?
THE COURT: It is. Because I want to get to the larger question for a moment of where this trial is going.

MR. CLARIDA: Well, then perhaps this question is a segue. We had told you earlier today during voir dire about this other witness, Elizabeth Artinian, who we might want to call for about ten minutes. She is a person who had worked with Mr. Tufenkian in Armenia when he designed the Eclipse. We found out on Wednesday of last week that she was in New York. And I told Mr. Moskin on Thursday morning that we wanted to call her if at all possible, and I offered to make her available for a deposition. We've been going back and forth about when that deposition would take place. We have offered again to make her available this evening. And Mr. Moskin informed me this afternoon that he is going to object to our calling that witness.

THE COURT: You are objecting to her?

MR. MOSKIN: Yes. She was never identified on the pretrial order.

THE COURT: Why wasn't she included in the pretrial order?

MR. CLARIDA: We didn't know she was in New York, your Honor. She had been in Armenia at the time of the depositions in the spring. And I didn't know she was in New York until Wednesday evening of last week, which was after the pretrial order went in.

THE COURT: Why didn't you raise this at the final pretrial conference last Friday?

MR. CLARIDA: Because I had spoken to Mr. Moskin beforehand, before the conference, and he said we could work out perhaps a deposition on Monday night. And so we were prepared to take him up on that.

MR. MOSKIN: I suggested that it was a possibility. I hope I didn't create the impression that I had agreed -- the real -- one of the real problems of course is timing. There's a lot else that needs to be done tonight. And frankly, if there were more time, I wouldn't object. It's really just the crunch of trying to get this done. I am not accusing plaintiff -- excuse me -- defendants of trying to engage in sharp practice or anything. It's just -- it just creates a great inconvenience at this late hour to introduce a new

witness, whose name came up in earlier -- in the deposition of Mr. Tufenkian months ago, but we have heard nothing about this person, who, as we understood, was living outside the country and wouldn't be available for a deposition.

THE COURT: But did Mr. Clarida discuss with you last week before the final pretrial conference that this witness was around?

MR. MOSKIN: Yes. He mentioned it, and I said I would see if we could accommodate his request. But I have a concern that we won't be able to do that.

THE COURT: What's the prejudice?

MR. MOSKIN: Just that I don't know what she will testify to, and I haven't had a chance to examine her beforehand.

THE COURT: Why don't you take her deposition for a half hour tomorrow morning, and then we will see whether there is any real prejudice here? Ordinarily I would say that if a witness weren't disclosed in a joint pretrial order, the witness is out. But apparently the witness was disclosed prior to the final pretrial conference and prior to the time that I signed off on the joint pretrial order, which I did at the conclusion of the conference last Friday. So it sounds in part that the hardship of having to do it in the midst of trial is self-created, if everybody was aware of it before the final pretrial conference. But on the question of prejudice, if

this -- why don't you take her deposition tomorrow morning for a half hour.

MR. MOSKIN: I'm not certain if I can get a reporter, among other things, available, on such short notice.

THE COURT: I'm sure you can get a reporter. If you can't get a reporter, take her deposition during lunch for a half hour. Her testimony is going to be ten minutes. What is she going to testify to?

MR. CLARIDA: She is going to testify to the way she worked with Mr. Tufenkian in creating the design. She was actually the computer operator that Mr. Tufenkian worked with in Armenia when he created the Eclipse design.

MR. MOSKIN: I'm not, frankly, given the time, the diversion this will be, this is very last-minute. It's not as if Mr. Clarida raised this a week before the pretrial conference. I think it was the day before. And there was no decision. I am not also sure that she has anything relevant to -- which may go to prejudice. But she was simply the computer operator who was doing what Mr. Tufenkian told. So I don't know -- I'm loath to devote the time now to depose her if it's not critical.

THE COURT: The defendant wants to call the witness. The wooden rule that because the witness wasn't disclosed in the pretrial order is a rule that I could rely upon, that some of my colleagues would rely upon, and just be done with it.

But she is here, she happens to be here, I guess quite by accident. Trials are supposed to be the search for truth. If he waited until today to drop her name on you, I would have no sympathy for him, for the defendant. But the fact of the matter is, he didn't wait. He told you when he found out. The fact that it's been in limbo is something that I fault both of you for not raising it with the Court last Friday. But I think you should make arrangements and take a short deposition. But I'll tell you, Mr. Clarida, it's to be around Mr. Moskin's schedule. And it is at Mr. Moskin's office if he decides he

wants to do it tonight. Not that he has to go to your office.
MR. CLARIDA: That's very well, your Honor.
THE COURT: Or you could do it at 8 o'clock tomorrow morning in his office if that's what he wants. It's a half hour. If you want to do it here, you have to let me know later tonight and we will make arrangements for a room someplace in the courthouse, because you can't use the jury room.
MR. MOSKIN: That, I think, would be the only practicable way to do it, would be to do it here so we don't have to be away from the court if we do it tomorrow.
THE COURT: Fine. We will get a -- I will get Judge Chin's jury room if he is not on trial. We will have a jury room for you tomorrow morning. You can call us. We will let you know where to go. All right.
MR. MOSKIN: What number are you recommend we call?

Just your chambers number?
THE COURT: Call my chambers later tonight.
Anything else that counsel want to raise?
MR. CLARIDA: No, your Honor.
MR. MOSKIN: Nothing, your Honor.
THE COURT: All right. Are we going to finish the trial of this case tomorrow? How long do you anticipate -- I'm not holding you to it -- but how long do you anticipate your cross-examination of Mr. Nicholls to be?
MR. CLARIDA: An hour.
THE COURT: How long will your direct be of Mr. Tufenkian?
MR. CLARIDA: An hour and a half perhaps.
THE COURT: I am concerned that we won't get to -- we may get to closing arguments tomorrow. But we may not get to the charge tomorrow. If need be I will shorten the luncheon recess a little tomorrow and make up for some time. I want to charge this jury no later than Wednesday morning, consistent with a fair trial. We will have to see how the rest of this case plays out.
All right. Have a good night.
MR. MOSKIN: Thank you.
MR. CLARIDA: Thank you, your Honor.
(Adjourned to 9:30 a.m., September 14, 2004) .

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